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## Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act

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# USING EXTRATERRITORIAL JURISDICTION TO PROSECUTE VIOLATIONS OF THE LAW OF WAR: LOOKING BEYOND THE WAR CRIMES ACT

**Abstract:** After September 11, 2001, additions and modifications to federal law placed renewed focus on the ability of the government to prosecute American citizens for extraterritorial misconduct that violates the law of war. This Note argues that federal laws, in their totality, provide the ability to prosecute American citizens who violate the law of war while outside the territorial limits of the United States. Although the scope of prosecutable offenses under the War Crimes Act is limited, other federal laws present prosecutors with multiple options for bringing an American citizen to justice in either a federal court or military court-martial for a violation of the law of war. The cases of *United States v. Passaro* and *United States v. Green* demonstrate that Americans who violate the law of war can be, and have been, prosecuted by using means other than the War Crimes Act. This Note highlights deficiencies, however, in federal laws that create circumstances where immunity from prosecution exists for certain assaults that violate the law of war. The Note then concludes with recommendations for congressional action to change federal law and the Uniform Code of Military Justice to fix existing deficiencies and strengthen the ability of the U.S. government to hold American citizens accountable for extraterritorial misconduct that violates the law of war.

## INTRODUCTION

At a military base in the Kunar Province of Afghanistan in the summer of 2003, David Passaro, an American citizen<sup>1</sup> working on behalf of the Central Intelligence Agency (the "CIA"), beat Abdul Wali using his hands, feet, and a large flashlight over the course of two

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<sup>1</sup> For the purposes of this Note, the term "American citizen" refers to a national of the United States as defined in the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(22) (2000) ("The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.").

days.<sup>2</sup> When Wali died on the fourth day of captivity as a result of his "interrogation," Passaro was not prosecuted in an Afghani court of law or military court-martial, but rather was brought to the U.S. District Court for the Eastern District of North Carolina to face federal criminal assault charges.<sup>3</sup> More than three years later, he was found guilty and subsequently sentenced to eight years and four months' imprisonment.<sup>4</sup>

The case of David Passaro represents the first indictment and prosecution of an American citizen for crimes committed abroad as part of the Global War on Terrorism.<sup>5</sup> Passaro was charged with assault using one of the federal statutes that provide for jurisdiction to prosecute American citizens for misconduct outside the territorial boundaries of the United States.<sup>6</sup> Cases such as his and a desire by society for accountability for similar bad acts have led legal scholars in recent years to examine the body of law that provides for extraterritorial jurisdiction to prosecute American citizens who violate the law of war.<sup>7</sup>

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<sup>2</sup> Indictment at 1, *United States v. Passaro*, No. 5:04-CR-211-1 (E.D.N.C. June 17, 2004) [hereinafter Indictment, *Passaro*].

<sup>3</sup> See *id.* at 2-4.

<sup>4</sup> *Nation in Brief*, WASH. POST, Feb. 14, 2007, at A10; Josh White & Dafna Linzer, *Ex-Contractor Guilty of Assaulting Detainee*, WASH. POST, Aug. 18, 2006, at A8.

<sup>5</sup> White & Linzer, *supra* note 4.

<sup>6</sup> Indictment, *Passaro*, *supra* note 2, at 2-4.

<sup>7</sup> See generally Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989 (2005) (citing ambiguity in procedures for prosecuting military contractors); William C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 BYU L. REV. 367 (arguing for military court-martial jurisdiction over civilian contractors); John Sifton, *United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutorial Gaps*, 43 HARV. J. ON LEGIS. 487 (2006) (arguing that systemic problems with federal law and criminal defenses hinder efforts at accountability for detainee abuse cases); Frederick A. Stein, *Have We Closed the Barn Door Yet? A Look at the Current Loopholes in the Military Extraterritorial Jurisdiction Act*, 27 HOUS. J. INT'L L. 579 (2005) (examining in detail the Military Extraterritorial Jurisdiction Act of 2000); Kateryna L. Rakowsky, Note, *Military Contractors and Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan*, 2 STAN. J. C.R. & C.L. 365 (2006) (evaluating methods of holding civilian contractors accountable for misconduct through private tort actions); Christopher C. Burris, *Time for Congressional Action: The Necessity of Delineating the Jurisdictional Responsibilities of Federal District Courts, Courts-Martial, and Military Commissions to Try Violations of the Laws of War*, 2005 FED. CTS. L. REV. 4, <http://www.fclr.org/2005fedctslrev4.htm> (contending that jurisdictional boundaries for military and federal courts for trying violations of the laws of war need clarification). For a discussion of what constitutes a violation of the law of war, see *infra* notes 18-73 and accompanying text.

Although laws have been available to prosecute American citizens for extraterritorial misconduct since 1790,<sup>8</sup> recent scholarly examination of the methods available to prosecute American citizens for crimes related to violations of the law of war has identified significant deficiencies.<sup>9</sup> However, this examination has also exposed a variety of federal laws that can be used by the American government to hold its citizens accountable for crimes that violate the law of war.<sup>10</sup>

This Note examines whether existing law is adequate to allow for the effective prosecution of American citizens who violate the law of war while outside the territorial boundaries of the United States.<sup>11</sup> Part I explains how the law of war is defined in U.S. courts using customary international law, as well as statutory definitions.<sup>12</sup> Part II addresses the basis for, and constitutional validity of, exercising extraterritorial jurisdiction to try Americans for overseas misconduct.<sup>13</sup> Part III examines the federal statutes that allow the prosecution of violations of the law of war.<sup>14</sup> Part IV considers contemporary prosecutions of American citizens for war crimes in U.S. federal courts.<sup>15</sup> Part V analyzes the existing gap in the law that could allow an American citizen to be immune from prosecution for commission of a violation of the law of war.<sup>16</sup> Lastly, Part VI makes recommendations for congressional action to change federal law to close that gap and strengthen the ability to prosecute Americans for violations of the law of war.<sup>17</sup>

## I. DEFINING VIOLATIONS OF THE LAW OF WAR

In seeking to define violations of the law of war, courts first look to treaties, executive acts, legislative acts, or prior judicial decisions for guidance.<sup>18</sup> When these treaties, acts, or decisions fail to provide a

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<sup>8</sup> An Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112, 112-16 (1790) (codified as amended in scattered sections of 18 U.S.C.).

<sup>9</sup> See generally Minow, *supra* note 7; Peters, *supra* note 7; Sifton, *supra* note 7; Stein, *supra* note 7; Rakowsky, *supra* note 7; Burris, *supra* note 7.

<sup>10</sup> See generally Minow, *supra* note 7; Peters, *supra* note 7; Sifton, *supra* note 7; Stein, *supra* note 7; Rakowsky, *supra* note 7; Burris, *supra* note 7.

<sup>11</sup> See *infra* notes 18-279 and accompanying text.

<sup>12</sup> See *infra* notes 18-73 and accompanying text.

<sup>13</sup> See *infra* notes 74-90 and accompanying text.

<sup>14</sup> See *infra* notes 91-160 and accompanying text.

<sup>15</sup> See *infra* notes 161-242 and accompanying text.

<sup>16</sup> See *infra* notes 243-260 and accompanying text.

<sup>17</sup> See *infra* notes 261-279 and accompanying text.

<sup>18</sup> See *infra* notes 31-35 and accompanying text.

complete definition in any given case, courts regularly resort to customary international law.<sup>19</sup>

*A. Use of Customary International Law in U.S. Courts to Define  
Violations of the Law of War*

Generally, what constitutes a violation of the law of war is a matter of interpretation for the courts to derive "from the 'experience of our wars' and . . . the 'laws and usages of war as understood and practiced by the civilized nations of the world.'"<sup>20</sup> Although there is significant debate as to whether it is proper for U.S. courts to resort to sources of foreign and international law to aid in interpreting issues,<sup>21</sup> such an approach has been affirmed for over two centuries and accepted as part of our modern jurisprudence.<sup>22</sup> As such, courts routinely resort to what is known as customary international law to guide them in interpreting what constitutes the law of war.<sup>23</sup>

As a legal term, customary international law reflects those practices and customs seen as the settled rules of international law to which civilized nations abide.<sup>24</sup> Customary international law is applied to issues before U.S. courts whenever there is no treaty, executive act, legislative act, or judicial decision that can provide guidance to decide an issue in a given case.<sup>25</sup> But, in interpreting customary international law as it applies to an issue, courts must consider the state of modern affairs and how customary international law exists in the moment, not in the past.<sup>26</sup>

Customary international law may inform courts in appropriate cases, but it may not limit or change the exercise of constitutional law-

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<sup>19</sup> See *infra* notes 25, 31-56 and accompanying text.

<sup>20</sup> See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2829 (2006) (Thomas, J., dissenting) (citing 11 Op. Att'y Gen. 297, 310 (1865)).

<sup>21</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 750 (2004) (Scalia, J., dissenting) ("For over two decades now, unelected federal judges have been usurping . . . lawmaking power by converting what they regard as norms of international law into American law.").

<sup>22</sup> See *id.* at 729-30 (majority opinion) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964); *The Paquete Habana*, 175 U.S. 677, 700 (1900); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815)).

<sup>23</sup> See, e.g., *Hamdan*, 126 S. Ct. at 2779-85 (plurality opinion); *Hamdi v. Rumsfeld*, 542 U.S. 507, 520-21 (2004); *United States v. Yousef*, 327 F.3d 56, 92-96, 99-108 (2d Cir. 2003); *Kadic v. Karadzic*, 70 F.3d 232, 238-45 (2d Cir. 1995); *United States v. Yunis*, 924 F.2d 1086, 1090-91 (D.C. Cir. 1991).

<sup>24</sup> See *Yousef*, 327 F.3d at 92 (citing *The Paquete Habana*, 175 U.S. at 694).

<sup>25</sup> See *Sosa*, 542 U.S. at 726; *Yousef*, 327 F.3d at 92.

<sup>26</sup> See *Kadic*, 70 F.3d at 238 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980)).

making powers by the political branches of the U.S. government.<sup>27</sup> Courts recognize that their duty is to decide issues based on "the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law."<sup>28</sup> When Congress passes an act to exclude an aspect of customary international law from the law of the land, the courts are bound to respect the exercise of that power and apply the act instead of the relevant principle of customary international law.<sup>29</sup> But, if legislation is subject to multiple interpretations, the court should adopt an interpretation not in conflict with customary international law.<sup>30</sup>

When courts grapple with the issue of what a violation of the law of war entails, they first seek direction in controlling treaties, executive acts, legislative acts, or judicial decisions.<sup>31</sup> But there is no all-encompassing definition of the law of war in these sources.<sup>32</sup> Courts, therefore, look to a variety of additional sources of law, including customary international law, to inform their judgment in any particular case.<sup>33</sup>

Accordingly, courts recognize that certain forms of outrageous conduct, such as the murder, rape, torture, or arbitrary detention of civilians, are universally accepted as criminal violations of the law of war, based on principles of customary international law.<sup>34</sup> The remaining body of the law of war is shaped by treaties, statutes, decisions in U.S. courts, and decisions in international courts.<sup>35</sup>

Prior to and during the Second World War, the law of war was largely defined by customary practices and international treaties, primarily the Fourth Hague Convention of 1907.<sup>36</sup> Additionally, in 1949,

<sup>27</sup> See *Sosa*, 542 U.S. at 726; *Yousef*, 327 F.3d at 92; *Yunis*, 924 F.2d at 1091 (citing U.S. CONST. art. VI).

<sup>28</sup> See *Sosa*, 542 U.S. at 731; *Yousef*, 327 F.3d at 86, 92–93; *Yunis*, 924 F.2d at 1091 (citing U.S. CONST. art. VI).

<sup>29</sup> See *Sosa*, 542 U.S. at 726, 731; *Yousef*, 327 F.3d at 93 (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21–22 (1963); *The Nereide*, 13 U.S. (9 Cranch) at 423; *United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983)).

<sup>30</sup> See *Yousef*, 327 F.3d at 86, 92 (citing *McCulloch*, 372 U.S. at 21; *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

<sup>31</sup> See *Sosa*, 542 U.S. at 726; *Yousef*, 327 F.3d at 92 (citing *The Paquete Habana*, 175 U.S. at 700).

<sup>32</sup> See *Hamdan*, 126 S. Ct. at 2829–30 (Thomas, J., dissenting).

<sup>33</sup> See *Sosa*, 542 U.S. at 726, 729–31; *Yousef*, 327 F.3d at 92 (citing *The Paquete Habana*, 175 U.S. at 700).

<sup>34</sup> See *Yousef*, 327 F.3d at 103–08; *Kadic*, 70 F.3d at 239, 242 (citing *In re Yamashita*, 327 U.S. 1, 14 (1946)).

<sup>35</sup> See *Hamdan*, 126 S. Ct. at 2780–85 (plurality opinion); *Yousef*, 327 F.3d at 92.

<sup>36</sup> See *Hamdan*, 126 S. Ct. at 2781 n.36 (plurality opinion) (citing *Yamashita*, 327 U.S. at 15–16); *Kadic*, 70 F.3d at 242 (citing *Yamashita*, 327 U.S. at 14).

the law of war was largely codified in four Geneva Conventions.<sup>37</sup> Ratified by the United States and more than 180 other nations, the Geneva Conventions, along with the Hague Conventions, have come to be regarded by the Supreme Court and other federal courts as the major treaties that courts should rely on in interpreting the law of war.<sup>38</sup>

In the past, legislative acts incorporated these major treaties by explicit reference when describing conduct that amounts to a violation of the law of war.<sup>39</sup> Other legislative acts dealing with violations of the law of war implicitly incorporated the wider body of customary international law by generally referencing the "law of war" or "law of nations."<sup>40</sup> In evaluating violations of the law of war, courts develop their own definitions based on customary international law and are naturally drawn to an examination of the Geneva and Hague Conventions for guidance in their interpretation.<sup>41</sup>

Prior federal court decisions also aid courts in defining the law of war and interpreting the Geneva Conventions.<sup>42</sup> In the past, U.S. courts have held that: customary international law includes the Geneva Conventions signed in 1949,<sup>43</sup> Common Article 3 of the Geneva Conventions is binding upon the United States as a signatory to the treaty,<sup>44</sup> all "parties" to a conflict are obligated to adhere to Common Article 3 of the Geneva Conventions,<sup>45</sup> a "party" need not be a signa-

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<sup>37</sup> *Kadic*, 70 F.3d at 242-43. See generally Geneva Convention (First) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention (Second) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (Third) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention (Fourth) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>38</sup> See *Hamdan*, 126 S. Ct. at 2786, 2789, 2794-98 (majority opinion in part and plurality opinion in part); *Hamdi*, 542 U.S. at 520; *Kadic*, 70 F.3d at 242-43; *Yunis*, 924 F.2d at 1098.

<sup>39</sup> War Crimes Act of 1996, 18 U.S.C. § 2441 (2000), amended by 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007); see *Hamdan*, 126 S. Ct. at 2802 (Kennedy, J., concurring).

<sup>40</sup> Uniform Code of Military Justice, 10 U.S.C.A. § 821 (West 1998 & Supp. IV 2007); Alien Tort Claims Act, 28 U.S.C. § 1350 (2000); see *Hamdan*, 126 S. Ct. at 2802 (Kennedy, J., concurring); *Kadic*, 70 F.3d at 238; *Burris*, *supra* note 7, at IV.C.1.

<sup>41</sup> See *Hamdan*, 126 S. Ct. at 2786-98 (majority opinion in part and plurality opinion in part); *Kadic*, 70 F.3d at 238, 242-43; *Burris*, *supra* note 7, at IV.C.1.

<sup>42</sup> See *Hamdan*, 126 S. Ct. at 2775-94 (majority opinion in part and plurality opinion in part); *Yousef*, 327 F.3d at 92 (citing *The Paquete Habana*, 175 U.S. at 700).

<sup>43</sup> See *Hamdan*, 126 S. Ct. at 2786, 2794 (majority opinion).

<sup>44</sup> See *id.* at 2794-96; *id.* at 2802 (Kennedy, J., concurring); *Kadic*, 70 F.3d at 242-43.

<sup>45</sup> See *Kadic*, 70 F.3d at 243.

tory to the Geneva Conventions or “even represent a legal entity capable of undertaking international obligations” to be subject to the requirements of Common Article 3 in a conflict,<sup>46</sup> the Geneva Conventions extend liability for substantive violations of the law of war to those who order their commission,<sup>47</sup> and the Fourth Hague Convention of 1907 imposes “command responsibility” on military commanders for the actions of their subordinates.<sup>48</sup>

Other “international sources” also inform courts evaluating what constitutes the law of war.<sup>49</sup> These sources include the records of the International Military Tribunals at Nuremberg, the International Criminal Tribunal for the former Yugoslavia, and other tribunals arising out of armed conflicts.<sup>50</sup> Courts have looked to those experiences to evaluate what charges and offenses constitute violations of the law of war.<sup>51</sup>

Thus, under customary international law, courts look to the following in identifying violations of the law of war:

- Forms of outrageous conduct, such as murder or rape, universally accepted as violations of the law of war under customary international law;<sup>52</sup>
- Major treaties, including the Geneva and Hague Conventions, accepted as codifications of the law of war under customary international law;<sup>53</sup>
- Prior judicial decisions defining aspects of the law of war under customary international law;<sup>54</sup>
- Customary laws and usages of war as practiced by civilized nations;<sup>55</sup> and
- Other “international sources” that can inform the courts.<sup>56</sup>

<sup>46</sup> See *Hamdan*, 126 S. Ct. at 2795 n.62 (majority opinion) (citing 3 INT’L COMM. OF RED CROSS, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 413 (1960)); *Kadic*, 70 F.3d at 243.

<sup>47</sup> See *Hamdan*, 126 S. Ct. at 2781 n.36 (plurality opinion) (citing Third Geneva Convention, *supra* note 37, art. 129; *Yamashita*, 327 U.S. at 15–16); *Kadic*, 70 F.3d at 243.

<sup>48</sup> See *Hamdan*, 126 S. Ct. at 2781 n.36 (plurality opinion) (citing *Yamashita*, 327 U.S. at 15–16).

<sup>49</sup> See *id.* at 2784.

<sup>50</sup> See *id.* at 2784–85; *Kadic*, 70 F.3d at 243.

<sup>51</sup> See *Hamdan*, 126 S. Ct. at 2784–85 (plurality opinion); *Kadic*, 70 F.3d at 243.

<sup>52</sup> See *Yousef*, 327 F.3d at 103–05; *Kadic*, 70 F.3d at 239, 242 (citing *Yamashita*, 327 U.S. at 14).

<sup>53</sup> See *Hamdan*, 126 S. Ct. at 2786, 2794–98 (majority opinion in part and plurality opinion in part); *Hamdi*, 542 U.S. at 520; *Kadic*, 70 F.3d at 242–43; *Yunis*, 924 F.2d at 1098.

<sup>54</sup> See *Hamdan*, 126 S. Ct. at 2775–94 (majority opinion in part and plurality opinion in part); *Kadic*, 70 F.3d at 243.

<sup>55</sup> See *Hamdan*, 126 S. Ct. at 2829–30 (Thomas, J., dissenting).

<sup>56</sup> See *id.* at 2784 (plurality opinion).



B. *Impact of Hamdan v. Rumsfeld and Congress's Reaction with the Military Commissions Act of 2006*

As mentioned above, Congress may nullify an aspect of customary international law by passing a controlling legislative act for that purpose.<sup>57</sup> In its 2006 decision in *Hamdan v. Rumsfeld*, the U.S. Supreme Court held that, because Congress requires military commissions to conform to the law of war, the military commissions being conducted in Guantanamo Bay, Cuba must meet the requirement of Common Article 3 that an unlawful combatant "be tried by a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'"<sup>58</sup> Justice Kennedy, in his concurring opinion, made clear that if Congress and the Bush administration want to implement laws to guide judicial interpretation of the law of war, the U.S. Constitution has given them the power to do so.<sup>59</sup>

The Bush administration and a Republican-controlled Congress reacted quickly to the decision by passing a bill that established a system of military commissions, prohibited the invoking of the Geneva Conventions as a right in any judicial proceeding to which an agent of the United States is a party, directed the President to interpret the meaning and application of the Geneva Conventions to the United States and issue regulations by Executive Order for violations that are not grave breaches of the Geneva Conventions, and modified the War Crimes Act to define statutorily grave breaches of Common Article 3 of the Geneva Conventions.<sup>60</sup> On October 17, 2006, the President signed

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<sup>57</sup> See *supra* notes 27–30 and accompanying text.

<sup>58</sup> See 126 S. Ct. at 2792–98 (majority opinion in part and plurality opinion in part) (citing 10 U.S.C. § 836 (2000), amended by 10 U.S.C.A. § 836 (West 1998 & Supp. IV 2007)); *id.* at 2799 (Kennedy, J., concurring) (citing 10 U.S.C. § 821 (2000), amended by 10 U.S.C.A. § 821 (West 1998 & Supp. IV 2007); Third Geneva Convention, *supra* note 37, art. 3). After being captured in Afghanistan, Salim Hamdan challenged the authority of a military commission to try him in Guantanamo Bay, Cuba on the grounds that neither a congressional act, nor the common law of war, authorized his trial on the charge of conspiracy. See *id.* at 2759 (majority opinion). Hamdan also alleged that the procedures to be used to try him by a military commission were illegal because they violated basic tenets of military and international law. See *id.*

<sup>59</sup> See *id.* at 2799–800 (Kennedy, J., concurring).

<sup>60</sup> See Military Commissions Act of 2006, Pub. L. No. 109-366, §§ 3–6, 120 Stat. 2600, 2600–35 (codified as amended at 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007)); Third Geneva Convention, *supra* note 37, art. 3; Karen DeYoung, *Court Told It Lacks Power in Detainee Cases*, WASH. POST, Oct. 20, 2006, at A18. The bill also amended statutes regarding the habeas corpus rights of detained persons determined to be enemy combatants or awaiting such determination. See Military Commissions Act of 2006 § 7.

into law the Military Commissions Act of 2006 and provided the courts with new guidance and direction for interpreting violations of the law of war.<sup>61</sup>

The debate over the Military Commissions Act in the House of Representatives provides perspective on the intent Congress had in defining grave breaches of Common Article 3 and giving the President the authority to otherwise interpret obligations under the Geneva Conventions.<sup>62</sup> The Chairman of the House Armed Services Committee, Duncan Hunter, a Republican representative from California, explained the rationale for changing the manner in which the Geneva Conventions should be interpreted under U.S. law:

This amendment is necessary because section C(3) of the War Crimes Act defines a war crime as any conduct which constitutes a violation of common article 3. Common article 3 prohibits some actions that are universally condemned, such as murder and torture, but it also prohibits outrages upon personal dignity and what is called humiliating and degrading treatment, phrases which are vague and do not provide adequate guidance to our personnel.

Since violation of common article 3 is a felony under the War Crimes Act, it is necessary to amend it to provide clarity and certainty to the interpretation of this statute. The surest way to achieve that clarity and certainty is to define the list of specific offenses that constitute war crimes punishable as grave violations of common article 3.

....

So what we have done is we have taken the offenses that are considered to be grave offenses under article 3 . . . and we define those as the offenses which will be applicable upon which prosecutions can be brought, and then we give to the President on what I would call infractions of Geneva article 3 or lesser violations of Geneva article 3, we give him the right to put together regulations that account for and treat actions that are defined under those minor offenses.<sup>63</sup>

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<sup>61</sup> See Military Commissions Act of 2006 §§ 5–6; *supra* notes 25–30 and accompanying text.

<sup>62</sup> See Military Commissions Act of 2006 § 6; 152 CONG. REC. H7522, 7533–59 (daily ed. Sept. 27, 2006).

<sup>63</sup> 152 CONG. REC. H7533, 7535, 7539 (statement of Rep. Hunter).

In passing the Military Commissions Act of 2006, Congress appeared to define by statute and regulations actions that would qualify as violations of the law of war under the Geneva Conventions.<sup>64</sup> By amending the War Crimes Act to provide definitions of grave breaches of Common Article 3, Congress created a controlling statute for interpreting when such grave breaches take place.<sup>65</sup> Under the Military Commissions Act, regulations that define other violations of the Geneva Conventions will be issued in the form of Executive Orders by the President that "shall be authoritative (except as to grave breaches of common Article 3) as a matter of United States law, in the same manner as other administrative regulations."<sup>66</sup>

*C. Interpreting the Law of War in U.S. Courts After the Passage of the Military Commissions Act of 2006*

The Military Commissions Act revised large portions of the War Crimes Act and directed U.S. courts to review and interpret grave breaches of Common Article 3 of the Geneva Conventions in light of the contents of § 2441(d) of the War Crimes Act.<sup>67</sup> By additionally legislating that the President shall issue Executive Orders interpreting the remainder of the Geneva Conventions, Congress has effectively put into place controlling legislative and executive acts that define the Geneva Conventions in a way that courts may not disregard.<sup>68</sup>

When faced in the future with a need to interpret a violation of the law of war, courts will be informed in their judgments by the following:

- Statutory definitions for what constitutes a grave breach of Common Article 3;<sup>69</sup>

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<sup>64</sup> See Military Commissions Act of 2006 § 6; 152 CONG. REC. H7535 (statement of Rep. Hunter).

<sup>65</sup> See War Crimes Act of 1996, 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007); Military Commissions Act of 2006 § 6; Third Geneva Convention, *supra* note 37, art. 3; *supra* notes 25–33 and accompanying text.

<sup>66</sup> See Military Commissions Act of 2006, Pub. L. No. 109-366, § 6, 120 Stat. 2600, 2600–35 (codified as amended at 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007)).

<sup>67</sup> See 18 U.S.C.A. § 2441; Military Commissions Act of 2006 § 6; Third Geneva Convention, *supra* note 37, art. 3.

<sup>68</sup> See Military Commissions Act of 2006 § 6; *Hamdan*, 126 S. Ct. at 2799–801 (Kennedy, J., concurring) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)); *supra* notes 25–33 and accompanying text.

<sup>69</sup> See 18 U.S.C.A. § 2441.

- Controlling Executive Orders interpreting and promulgating standards and administrative regulations for other violations of the Geneva Conventions;<sup>70</sup>
- Prior judicial decisions defining aspects of customary international law exclusive of the provisions of the Geneva Conventions, such as the concept of “command responsibility” developed from the Fourth Hague Convention of 1907;<sup>71</sup>
- Customary laws and usages of war as practiced by civilized nations that are not covered by the President’s interpretations of the provisions of the Geneva Conventions;<sup>72</sup> and
- Other “international sources” that can inform the courts on issues falling outside the President’s interpretations of the provisions of the Geneva Conventions.<sup>73</sup>

## II. BASIS FOR JURISDICTION IN U.S. COURTS FOR EXTRATERRITORIAL MISCONDUCT

Even if an American citizen were to commit a crime that fit within the definitions of the War Crimes Act, could the United States prosecute her for misconduct that took place outside its territory? Would such prosecution impinge upon the right of another nation to prosecute crimes committed within its own borders? Generally, jurisdiction over American citizens by use of statutes that apply extraterritorially is proper where issues of sovereignty are addressed, Congress clearly intended for a statute to apply outside the territorial boundaries of the United States, and the extraterritorial application of a statute would not violate due process.<sup>74</sup>

### A. *Issues of Sovereignty*

Until the early part of the twentieth century, the general presumption was that nations had exclusive sovereignty and jurisdiction within

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<sup>70</sup> See Military Commissions Act of 2006 § 6. As of April 3, 2007, the President has not issued an Executive Order as called for by the Military Commissions Act. See The White House, Executive Orders Issued by President George W. Bush, <http://www.whitehouse.gov/news/orders> (last visited Apr. 3, 2007).

<sup>71</sup> See *Hamdan*, 126 S. Ct. at 2781 n.36 (plurality opinion) (citing Third Geneva Convention, *supra* note 37, art. 129; *Yamashita*, 327 U.S. at 15–16).

<sup>72</sup> See *id.* at 2829–30 (Thomas, J., dissenting).

<sup>73</sup> See *id.* at 2784 (plurality opinion).

<sup>74</sup> See *infra* notes 75–90 and accompanying text.

their borders.<sup>75</sup> The idea that one nation could exercise exclusive legislative jurisdiction over another, absent conquest or consent, has generally been rejected as inconsistent with the principle of sovereignty under international law.<sup>76</sup> But, the concept that two nations may have concurrent jurisdiction over a particular controversy is accepted, as it presents few sovereignty issues and frequently arises in modern times.<sup>77</sup>

Where there is consent to the exercise of concurrent jurisdiction, nations often establish treaties that delineate how and to what extent one nation may exercise extraterritorial jurisdiction within the other's borders.<sup>78</sup> Additionally, international law recognizes that the exercise of extraterritorial jurisdiction is appropriate where a sufficient connection exists between the controversy in question and the nation seeking to exercise jurisdiction, or the controversy is so outrageous as to be universally condemned, as in the case of sexual abuse of children.<sup>79</sup> Thus, the United States's application of extraterritorial jurisdiction does not infringe on the sovereign rights of a foreign nation where there is consent to such exercise, the foreign nation is unable to object, there is a sufficient connection between the controversy and the nation seeking to exercise jurisdiction, or the controversy is so outrageous as to be universally condemned.<sup>80</sup>

### B. *Constitutional Basis: Congressional Authority and Due Process*

It is not enough that the exercise of extraterritorial jurisdiction by the United States not violate principles of international law regarding sovereignty.<sup>81</sup> When a U.S. court is called upon to enforce a domestic law beyond the territorial boundaries of the United States, the statute sought to be applied must have been passed by a valid exercise of con-

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<sup>75</sup> See *United States v. Gatlin*, 216 F.3d 207, 217 (2d Cir. 2000).

<sup>76</sup> See *United States v. Corey*, 232 F.3d 1166, 1171 (9th Cir. 2000) (citing *In re Ross*, 140 U.S. 453, 464 (1891)); *Gatlin*, 216 F.3d at 216–17.

<sup>77</sup> See *Corey*, 232 F.3d at 1179.

<sup>78</sup> See *id.* at 1180. Examples of consent, as seen in *Corey* and *Gatlin*, are Status of Forces Agreements regarding jurisdiction over crimes committed by military members in countries that host American Armed Forces. See *id.* at 1181–83; *Gatlin*, 216 F.3d at 209.

<sup>79</sup> See *United States v. Clark*, 315 F. Supp. 2d 1127, 1131–32 (W.D. Wash. 2004), *aff'd*, 435 F.3d 1100 (9th Cir. 2006).

<sup>80</sup> See *Corey*, 232 F.3d at 1171, 1180; *Clark*, 315 F. Supp. 2d at 1131–32.

<sup>81</sup> See *Corey*, 232 F.3d at 1170–71; *Gatlin*, 216 F.3d at 211–12.

gressional power, and such application must not violate the Due Process Clause of the Fifth Amendment under the U.S. Constitution.<sup>82</sup>

Courts acknowledge congressional authority to pass laws that regulate conduct beyond the territorial boundaries of the United States.<sup>83</sup> But laws passed by Congress are presumed not to have extraterritorial application absent a clearly expressed intent to the contrary.<sup>84</sup> Where Congress indicates its intent for a statute to apply extraterritorially, courts must follow Congress's direction unless doing so would violate the Due Process Clause.<sup>85</sup>

Under the Due Process Clause, a statute may not be applied extraterritorially in an arbitrary, unfair, or unreasonable manner.<sup>86</sup> Courts have held that due process is not violated when the government shows a sufficient nexus between the act in question and the United States, such that a defendant "should reasonably anticipate being hauled into court in this country" by extraterritorial application of a statute.<sup>87</sup>

U.S. courts accept five principles of international law as providing a basis for holding that a sufficient nexus between a controversy and the United States exists.<sup>88</sup> The principles are:

- (1) the objective territorial principle, under which jurisdiction is asserted over acts performed outside the United States that produce detrimental effects in the United States; (2) the protective principle, under which jurisdiction is asserted over foreigners for acts committed outside the United States that may impinge on the territorial integrity, security, or political independence of the United States; (3) the nationality principle, under which jurisdiction is based on the nationality or national character of the offender; (4) the universality principle, which provides jurisdiction over extraterritorial acts for crimes so heinous as to be universally condemned; and (5) the pas-

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<sup>82</sup> See U.S. CONST. amend. V; *United States v. Yousef*, 327 F.3d 56, 86 (2d Cir. 2003) (citing *United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983)); *Corey*, 232 F.3d at 1170-71; *Clark*, 315 F. Supp. 2d at 1131-33.

<sup>83</sup> See *Yousef*, 327 F.3d at 86 (citing *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

<sup>84</sup> See *id.* (citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993)).

<sup>85</sup> See U.S. CONST. amend. V; *Yousef*, 327 F.3d at 86 (citing *Pinto-Mejia*, 720 F.2d at 259).

<sup>86</sup> See U.S. CONST. amend. V; *Clark*, 315 F. Supp. 2d at 1132 (citing *United States v. Davis*, 905 F.2d 245, 248-49 (9th Cir. 1990)).

<sup>87</sup> See *Clark*, 315 F. Supp. 2d at 1132 (quoting *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998)).

<sup>88</sup> See *id.* at 1131 (citing *United States v. Vasquez-Velasco*, 15 F.3d 833, 840 n.5 (9th Cir. 1994)).

sive personality principle, under which jurisdiction is based upon the nationality of the victim.<sup>89</sup>

Thus, statutes that have a basis in one of these principles, and express an intention for application outside the territorial borders of the United States, may be applied extraterritorially without raising constitutional issues regarding congressional power or the Due Process Clause of the Fifth Amendment.<sup>90</sup>

### III. FEDERAL STATUTES ALLOWING FOR PROSECUTION OF AMERICAN CITIZENS FOR VIOLATING THE LAW OF WAR

No single federal statute criminalizes all violations of the law of war.<sup>91</sup> The War Crimes Act comes close, but limits criminalization to grave breaches of the Geneva Conventions,<sup>92</sup> grave breaches of Common Article 3 of the Geneva Conventions as defined by statute, and certain conduct prohibited by the Hague Conventions.<sup>93</sup>

In fact, a significant portion of the law of war arising out of customary international law is not criminalized in the War Crimes Act.<sup>94</sup> Specifically, the War Crimes Act does not cover assaults not resulting in serious bodily injury and offensive acts upon people within U.S. custody or control not rising to the statutory definition of cruel or inhuman treatment in § 2441(d) of the War Crimes Act.<sup>95</sup> Many commentators argue that such selective criminalization in federal statutes allows U.S. government personnel to perform certain acts that violate the law of war with immunity from prosecution.<sup>96</sup> At a minimum, the

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<sup>89</sup> *Id.*

<sup>90</sup> See U.S. CONST. amend. V; *Yousef*, 327 F.3d at 86; *Corey*, 232 F.3d at 1170–72; *Clark*, 315 F. Supp. 2d at 1131–32.

<sup>91</sup> See, e.g., Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (2000 & Supp. III 2003); Anti-Torture Statute, 18 U.S.C. §§ 2340–2340A (2000, Supp. III 2003 & Supp. IV 2004); War Crimes Act of 1996, 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007).

<sup>92</sup> See 18 U.S.C.A. § 2441(c)(1); Third Geneva Convention, *supra* note 37, art. 130.

<sup>93</sup> See 18 U.S.C.A. § 2441. The War Crimes Act of 1996 also criminalizes certain conduct that violates provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices. See *id.*

<sup>94</sup> See *id.*; Third Geneva Convention, *supra* note 37, art. 3; *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995) (citing First Geneva Convention, *supra* note 37, art. 3); *supra* notes 20–56 and accompanying text.

<sup>95</sup> See 18 U.S.C.A. § 2441; Third Geneva Convention, *supra* note 37, art. 3.

<sup>96</sup> See generally Minow, *supra* note 7; Sifton, *supra* note 7; Rakowsky, *supra* note 7; Burris, *supra* note 7.

War Crimes Act does not reflect all offenses that would be regarded as customary violations of the law of war.<sup>97</sup>

But, other federal criminal statutes provide the ability to charge those offenses that are not considered criminal under the War Crimes Act, yet violate the traditional understanding of the law of war.<sup>98</sup> Some federal criminal statutes covering customary violations of the law of war, such as those regarding sex offenses, duplicate offenses that are chargeable as grave breaches of Common Article 3 under the War Crimes Act.<sup>99</sup> The federal statutes discussed below allow for the prosecution of American citizens for offenses that, when committed in an armed conflict, would violate the customary law of war and be fit for prosecution in U.S. courts.<sup>100</sup>

### A. Statutes Extraterritorial by Declared Intent

#### 1. War Crimes Act of 1996

As discussed above, the War Crimes Act criminalizes certain conduct—by members of the U.S. Armed Forces or a U.S. national—that is defined by statute as a war crime.<sup>101</sup> Congress explicitly indicated its intent for the statute to apply extraterritorially by making it applicable to conduct “inside or outside the United States.”<sup>102</sup>

The extraterritorial application of the statute does not violate due process because subjecting members of the Armed Forces or U.S. nationals to trial in a U.S. court is not unreasonable, unfair, or arbitrary under the nationality principle.<sup>103</sup> Additionally, some war crimes are so heinous and universally condemned that the universality principle negates any due process consideration.<sup>104</sup>

<sup>97</sup> See 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007); Third Geneva Convention, *supra* note 37, art. 3; *supra* notes 20–56 and accompanying text.

<sup>98</sup> See 18 U.S.C.A. § 2441; Third Geneva Convention, *supra* note 37, art. 3; *supra* notes 20–56 and accompanying text; *infra* notes 101–160 and accompanying text.

<sup>99</sup> See 18 U.S.C.A. §§ 2241–2244; *id.* § 2441; *supra* notes 20–56 and accompanying text.

<sup>100</sup> See *infra* notes 101–160 and accompanying text. It is worth noting that the Alien Tort Claims Act and Torture Victim Protection Act provide a cause of action for civil liability in U.S. courts for violations of aspects of customary international law. See 28 U.S.C. § 1350 (2000). An examination of such civil liability is beyond the scope of this Note.

<sup>101</sup> See 18 U.S.C.A. § 2441; *supra* notes 92–97 and accompanying text.

<sup>102</sup> See 18 U.S.C.A. § 2441(a).

<sup>103</sup> See U.S. CONST. amend. V; 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007); *supra* notes 86–90 and accompanying text.

<sup>104</sup> See U.S. CONST. amend. V; *supra* notes 86–90 and accompanying text.



## 2. Genocide Convention Implementation Act of 1987 and the Anti-Torture Statute

The Genocide Convention Implementation Act of 1987 criminalizes certain conduct "with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group."<sup>105</sup> Congress indicated its intent for the statute to apply extraterritorially by defining two different circumstances when it shall apply.<sup>106</sup> In the first circumstance, the statute applies when the offense is committed within the United States.<sup>107</sup> The second circumstance indicates extraterritorial application by tying applicability not to geography, but to the status of "the alleged offender as a national of the United States."<sup>108</sup>

The Anti-Torture Statute criminalizes the commission or attempted commission of torture, as well as the act of conspiring to commit torture.<sup>109</sup> Congress was explicit that this act was meant to apply solely to extraterritorial action by defining the offense as one taking place "outside the United States."<sup>110</sup> Jurisdiction over the offense exists where the offender is a U.S. national or the offender is present in the United States, irrespective of the nationality of the victim or offender.<sup>111</sup>

Extraterritorial application of either statute does not violate due process because of both the nationality and universality principles.<sup>112</sup> Subjecting U.S. nationals to trial for torture or genocide in a U.S. court is not unreasonable, unfair, or arbitrary under the nationality principle.<sup>113</sup> Subjecting those who have committed an act of torture to prosecution when that person is present in the United States is not unfair, unreasonable, or arbitrary because torture is an act that is universally condemned.<sup>114</sup>

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<sup>105</sup> Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091(a) (2000 & Supp. III 2003).

<sup>106</sup> See *id.* § 1091(d).

<sup>107</sup> See *id.* § 1091(d)(1).

<sup>108</sup> See *id.* § 1091(d)(2).

<sup>109</sup> See Anti-Torture Statute, 18 U.S.C. § 2340A (2000 & Supp. IV 2004). See generally David Johnston, *Son of Liberia's Ex-Leader Charged in Miami Under Anti-Torture Law*, N.Y. TIMES, Dec. 7, 2006, at A5 (describing the first case in which federal authorities invoked the Anti-Torture Statute).

<sup>110</sup> See 18 U.S.C. § 2340A(a).

<sup>111</sup> See *id.* § 2340A(b).

<sup>112</sup> See U.S. CONST. amend. V; *supra* notes 86–90 and accompanying text.

<sup>113</sup> See 18 U.S.C. § 1091 (2000 & Supp. III 2003); 18 U.S.C. § 2340A; *supra* notes 86–90 and accompanying text.

<sup>114</sup> See 18 U.S.C. § 2340A; *supra* notes 86–90 and accompanying text.

## B. Statutes Extending Jurisdiction to Certain Areas or Classes of People

### 1. Special Maritime and Territorial Jurisdiction Statute

Having evolved from its 1790 predecessor,<sup>115</sup> the Special Maritime and Territorial Jurisdiction ("SMTJ") Statute extends jurisdiction, as one court has opined, to the ends of the earth and beyond.<sup>116</sup> The SMTJ Statute operates under the idea that jurisdiction over crimes or controversies should extend to certain areas where "American citizens and property need protection, yet no other government effectively safeguards those interests."<sup>117</sup> It creates an area of special jurisdiction that Congress may expressly apply to certain crimes by reference when it defines the scope of territorial applicability for a statute.<sup>118</sup>

Prior to the passage of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the "USA PATRIOT Act"), the SMTJ Statute included eight specific areas that Congress felt should be part of the special jurisdiction of U.S. courts.<sup>119</sup> These areas of special jurisdiction encompass U.S. vessels on the high seas, U.S. vessels on certain international waterways, land acquired for the use of the United States such as military bases and embassies, and U.S. aircraft in flight.<sup>120</sup>

The USA PATRIOT Act added a ninth area that greatly expanded the exercise of jurisdiction over offenses committed by or against nationals of the United States.<sup>121</sup> The added provision, § 7(9), expanded the SMTJ of the United States to any place or residence in a foreign state used by missions or entities of the U.S. government with respect to offenses committed by or against a national of the United States.<sup>122</sup> This

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<sup>115</sup> See An Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112, 112-16 (1790) (codified as amended in scattered sections of 18 U.S.C.).

<sup>116</sup> See 18 U.S.C. § 7 (2000 & Supp. III 2003); *United States v. Corey*, 232 F.3d 1166, 1171 (9th Cir. 2000).

<sup>117</sup> See 18 U.S.C. § 7; *Corey*, 232 F.3d at 1171.

<sup>118</sup> See 18 U.S.C. § 7.

<sup>119</sup> See *id.* (2000), amended by *id.* § 7(9) (Supp. III 2003); *Corey*, 232 F.3d at 1171; see also USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 804, 115 Stat. 272 (2001) (codified as amended at 18 U.S.C. § 7(9)).

<sup>120</sup> See 18 U.S.C. § 7 (2000), amended by *id.* § 7(9) (Supp. III 2003); *Corey*, 232 F.3d at 1171, 1183 (holding that an off-base residence falls within the special territorial jurisdiction of the United States); *United States v. Erdos*, 474 F.2d 157, 160 (4th Cir. 1974) (holding that an embassy falls within the special territorial jurisdiction of the United States). But see *United States v. Gatlin*, 216 F.3d 207, 223 (2d Cir. 2000) (holding that an off-base residence does not fall within the special territorial jurisdiction of the United States).

<sup>121</sup> See USA PATRIOT Act of 2001 § 804.

<sup>122</sup> See *id.*

new area of SMTJ provides the U.S. government the ability to prosecute offenses occurring within areas as varied as a U.S. Agency for International Development compound in a foreign country, a safe house used for detention and interrogation by U.S. intelligence personnel, prisons owned by a foreign nation but used for government purposes by U.S. intelligence personnel, or an off-base residence in a foreign country occupied by U.S. personnel assigned to that country.<sup>123</sup>

## 2. Military Extraterritorial Jurisdiction Act of 2000

The Military Extraterritorial Jurisdiction Act (the "MEJA") does not extend jurisdiction to areas beyond the normal territorial borders of the United States.<sup>124</sup> The MEJA does, however, create status-based jurisdiction that attaches to a person if she engages in certain conduct while a member of the Armed Forces or while employed by or accompanying the Armed Forces outside the United States.<sup>125</sup> Any offense that would be punishable by imprisonment for more than one year had the offense been committed in the SMTJ of the United States triggers such status-based jurisdiction under the MEJA.<sup>126</sup>

The MEJA, however, does not preempt the jurisdiction of a military court-martial over a member of the Armed Forces.<sup>127</sup> Instead, the MEJA only allows for jurisdiction over crimes committed by a member of the Armed Forces when that person ceases to be subject to the provisions of the Uniform Code of Military Justice (the "UCMJ") due to separation from the service prior to being subject to a court-martial or other punitive action for the offense.<sup>128</sup>

## 3. Those Subject to the MEJA and 18 U.S.C. § 7(9)

In 2004, the applicability of the MEJA to contractors from a government agency other than the Department of Defense received a good degree of scrutiny in the course of the investigation into the Abu Ghraib prison scandal.<sup>129</sup> After the investigation, the definition of those

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<sup>123</sup> See 18 U.S.C. § 7 (2000 & Supp. III 2003); USA PATRIOT Act of 2001 § 804.

<sup>124</sup> See MEJA, 18 U.S.C. §§ 3261–3267 (2000 & Supp. IV 2004).

<sup>125</sup> See *id.* § 3261(a) (2000).

<sup>126</sup> See *id.*

<sup>127</sup> See *id.* § 3261.

<sup>128</sup> See *id.* § 3261(d); *Solorio v. United States*, 483 U.S. 434, 436, 439, 450–51 (1987) (holding that court-martial jurisdiction is based on the accused having military status).

<sup>129</sup> See MEJA, 18 U.S.C. §§ 3261–3267 (2000), amended by *id.* § 3267 (Supp. IV 2004); Ellen McCarthy & Renae Merle, *Contractors and the Law*, WASH. POST, Aug. 27, 2004, at E1; Renae Merle & Ellen McCarthy, *6 Employees from CACI International, Titan Referred for Prose-*

personnel covered by the MEJA, as outlined in § 3261(a) and further defined in § 3267, was modified by the National Defense Authorization Act for Fiscal Year 2005 to make clear that the provisions of the MEJA apply to non-Department of Defense federal employees or contractors working *in support of* the mission of the Department of Defense overseas.<sup>130</sup> The 2004 modification to the MEJA did not address the troubling, limited circumstance where a person could be immune from prosecution for a violation of the law of war if his or her offense took place in an area defined by § 7(9) of the SMTJ Statute and the maximum punishment did not exceed one year.<sup>131</sup>

Section 7(9) is wide in the scope of its definition of areas that are within the SMTJ, but it is limited in application because it “does not apply with respect to an offense committed by a person described in [§] 3261(a) [of the MEJA].”<sup>132</sup> This distinction is important to note because for one to be charged using the MEJA or the SMTJ Statute for extraterritorial misconduct that violates the law of war while having been a member of the Armed Forces or employed in support of the mission of the Department of Defense overseas, the offense has to carry a sentence of more than one year, or the offense needs to have taken place in an area defined by § 7(1)–(8).<sup>133</sup>

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cution, WASH. POST, Aug. 26, 2004, at A18; Scott Shane, *Some U.S. Prison Contractors May Avoid Charges*, BALT. SUN, May 24, 2004, at 1A.

<sup>130</sup> See 18 U.S.C. §§ 3261(a), 3267 (2000), amended by *id.* § 3267 (Supp. IV 2004); Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1088, 118 Stat. 1811 (2004) (codified as amended at 18 U.S.C. § 3267 (Supp. IV 2004)). See generally Glenn R. Schmitt, *Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforeseen Loophole*, ARMY LAW., June 2005, at 41 (explaining history of the MEJA and subsequent amendment in 2004).

<sup>131</sup> See 18 U.S.C. § 7(9) (Supp. III 2003); 18 U.S.C. §§ 3261–3267 (2000 & Supp. IV 2004); *supra* notes 20–56 and accompanying text. For instance, the penalty for an assault by striking, beating, or wounding under the federal criminal statute is less than one year. 18 U.S.C. § 113(a)(4) (2000). A person could not be prosecuted under the MEJA for an assault by beating upon an Iraqi civilian detained at a military base even though it would be considered a violation of the law of war under customary international law. See *id.*; 18 U.S.C. §§ 3261–3267; *supra* notes 20–56 and accompanying text.

<sup>132</sup> See 18 U.S.C. § 7(9); 18 U.S.C. §§ 3261(a), 3267. Section 3261(a), as amended following Abu Ghraib, defines “employed by the Armed Forces” as including civilian employees, contractors, and employees of contractors working for the Department of Defense overseas, as well as employees, contractors, and employees of contractors working for other federal agencies or any provisional authority to the extent that such employment relates to supporting the mission of the Department of Defense overseas. 18 U.S.C. §§ 3261(a), 3267.

<sup>133</sup> See 18 U.S.C. § 7 (2000 & Supp. III 2003); 18 U.S.C. §§ 3261–3267; *supra* notes 20–56 and accompanying text.

#### 4. Constitutionally Valid Basis for Jurisdiction in U.S. Courts for Extraterritorial Misconduct Using the MEJA or the SMTJ Statute

Using either the MEJA or the SMTJ Statute to prosecute an American citizen for extraterritorial misconduct is constitutionally valid because both statutes clearly express Congress's intent that they apply beyond the territorial boundaries of the United States.<sup>134</sup> The MEJA explicitly cites "conduct outside the United States"<sup>135</sup> and the extraterritorial provisions in the SMTJ Statute reference territory outside the United States.<sup>136</sup> Furthermore, extraterritorial application does not violate due process because it is not unreasonable, unfair, or arbitrary to subject American citizens or members of the Armed Forces to trial in a U.S. court under the nationality principle.<sup>137</sup>

#### 5. Civilian Courts-Martial Under the UCMJ

When the National Defense Authorization Act for Fiscal Year 2007 was passed in October of 2006, jurisdiction of the UCMJ was modified so that civilians accompanying the military in a declared war or contingency operation, as defined by § 101(a)(13) of Title 10, may be subject to trial by court-martial.<sup>138</sup> This recent modification nullifies the 1970 U.S. Court of Military Appeals holding in *United States v. Averette* that a civilian accompanying the Armed Forces could only be subject to a court-martial where there has been an express declaration of war by Congress.<sup>139</sup> Building on a series of decisions since World War II dealing with civilian courts-martial, *Averette* had further limited the historic use of courts-martial to enforce discipline amongst civilians accompanying military forces in the field.<sup>140</sup> As recently as 1987, in *Solorio v. United*

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<sup>134</sup> See 18 U.S.C. § 7; 18 U.S.C. §§ 3261–3267; *supra* notes 81–85 and accompanying text.

<sup>135</sup> See MEJA, 18 U.S.C. § 3261(a) (2000).

<sup>136</sup> See 18 U.S.C. § 7; *Corey*, 232 F.3d at 1171–72; *Erdos*, 474 F.2d at 160; *supra* notes 81–85 and accompanying text.

<sup>137</sup> See U.S. CONST. amend. V; *United States v. Clark*, 315 F. Supp. 2d 1127, 1131–32 (W.D. Wash. 2004), *aff'd*, 435 F.3d 1110 (9th Cir. 2006); *supra* notes 86–90 and accompanying text.

<sup>138</sup> See 10 U.S.C. § 101(a)(13) (2000); John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (codified as amended at 10 U.S.C.A. § 802 (West 1998 & Supp. IV 2007)).

<sup>139</sup> See John Warner National Defense Authorization Act for Fiscal Year 2007 § 552; 10 U.S.C.A. § 802; 41 C.M.R. 363, 365 (1970).

<sup>140</sup> See *Solorio*, 483 U.S. at 436, 439, 450–51; *McElroy v. Guagliardo*, 361 U.S. 281, 283–84 (1960) (holding that civilian employees accompanying the military overseas in peacetime may not be subject to civilian courts-martial for noncapital offenses); *Grisham v. Hagan*, 361 U.S. 278, 280 (1960) (holding that civilian employees accompanying the mili-

*States*, the U.S. Supreme Court addressed the issue of court-martial jurisdiction and held that military law could apply only to those who have a military status.<sup>141</sup>

Because military commanders who exercise court-martial authority have yet to use this new statutory power to court-martial a civilian, this change in jurisdiction of the UCMJ has not been subject to application or judicial review.<sup>142</sup> Nonetheless, critics have already weighed in to suggest that the application of military law to civilians is unconstitutional.<sup>143</sup> A major criticism of the change in the law is that it deprives civilians of certain legal protections they otherwise would enjoy in federal courts, such as a right to a grand jury hearing and a right to trial by a jury of one's peers.<sup>144</sup> Proponents argue that the change in jurisdiction enhances accountability over military contractors and that the military justice system has sufficiently changed in the last forty years so that the lack of constitutional protections has been ameliorated.<sup>145</sup>

Some predict that upon being challenged, the new law will fail in the face of Supreme Court precedent that rejects the application of military law to civilians.<sup>146</sup> Alternatively, one could envision the development of a test to determine if a civilian accompanying the Armed

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tary overseas may not be subject to civilian courts-martial for capital offenses); *Reid v. Covert*, 354 U.S. 1, 5 (1957) (plurality opinion) (holding that civilian dependents accompanying the military overseas may not be subject to civilian courts-martial for capital offenses); *Averette*, 41 C.M.R. at 365; MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 202 analysis, at A21-11 (2005) [hereinafter MCM]. See generally David A. Melson, *Military Jurisdiction over Civilian Contractors: A Historical Overview*, 52 NAVAL L. REV. 277 (2005).

<sup>141</sup> See 483 U.S. at 436, 439, 450–51.

<sup>142</sup> See 10 U.S.C.A. § 802; Griff Witte, *New Law Could Subject Civilians to Military Trial*, WASH. POST, Jan. 15, 2007, at A1; Stephen Fidler & Demetri Sevastopulo, *Civilian Workers Could Face Court Martial*, MSNBC.COM, Jan. 10, 2007, available at <http://www.bc.edu/schools/law/lawreviews/bclawreview.html>; Peter W. Singer, *Frequently Asked Questions on the UCMJ Change and Its Applicability to Private Military Contractors*, BROOKINGS INSTITUTION, Jan. 12, 2007, <http://www.brookings.edu/views/op-ed/psinger/20070112.htm> [hereinafter Singer, *Frequently Asked Questions*]; Peter W. Singer, *The Law Catches Up to Private Militaries, Embeds*, BROOKINGS INSTITUTION, Jan. 4, 2007, <http://www.brookings.edu/views/articles/psinger/20070104.htm> [hereinafter Singer, *The Law Catches Up to Private Militaries*].

<sup>143</sup> See Witte, *supra* note 142; Fidler & Sevastopulo, *supra* note 142; Singer, *Frequently Asked Questions*, *supra* note 142.

<sup>144</sup> See 10 U.S.C.A. § 802 (West 1998 & Supp. IV 2007); Witte, *supra* note 142; Fidler & Sevastopulo, *supra* note 142.

<sup>145</sup> See 10 U.S.C.A. § 802; Witte, *supra* note 142; Singer, *Frequently Asked Questions*, *supra* note 142; Singer, *The Law Catches Up to Private Militaries*, *supra* note 142. See generally Peters, *supra* note 7 (arguing that sufficient due process protections presently exist for the accused within the military justice system).

<sup>146</sup> See *Solorio*, 483 U.S. at 450–51; *McElroy*, 361 U.S. at 287; *Grisham*, 361 U.S. at 280; *Reid*, 354 U.S. at 5; *Averette*, 41 C.M.R. at 365; Witte, *supra* note 142; Fidler & Sevastopulo, *supra* note 142; Singer, *Frequently Asked Questions*, *supra* note 142.

Forces has a de facto military status such that he or she could be subject to court-martial jurisdiction within the holding in *Solorio*.<sup>147</sup> One could also imagine a reversal of the Court's holding in *Solorio* and a return to a test of court-martial jurisdiction based on a service connection of the offense to the Armed Forces.<sup>148</sup>

Considering the persuasive precedent and the evolution of a means for prosecuting civilians for extraterritorial misconduct by use of the MEJA, a finding of unconstitutionality could be likely.<sup>149</sup> But, as one commentator points out, "predicting what the Supreme Court may or may not rule seems a lot like predicting the lottery. We won't know until there is a test case. Until then, it's the law of the land."<sup>150</sup>

### C. Title 18 Criminal Statutes Applying Within the SMTJ

As discussed above, a number of criminal statutes apply within the SMTJ of the United States that qualify as violations of the law of war under customary international law when committed against persons not taking part in hostilities, such as civilians, detainees, or prisoners who have laid down their arms.<sup>151</sup> In general, these crimes include

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<sup>147</sup> See 10 U.S.C.A. § 802; 483 U.S. at 439–40 ("The test for jurisdiction . . . is one of status, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.'" (citing *Kinsella v. Singleton*, 361 U.S. 234, 240–41 (1960))); *Reid*, 354 U.S. at 22–23 ("We recognize that there might be circumstances where a person could be 'in' the armed services for purposes of [being considered 'in the land or naval forces'] even though he had not formally been inducted into the military or did not wear a uniform."). Such a test could objectively examine the totality of the circumstances to determine whether a civilian could be seen as a member of the Armed Forces. See *Reid*, 354 U.S. at 22–23. Factors to examine might include whether a uniform is worn, whether the civilian is embedded within a military unit, whether the civilian's immediate superior is a military member, and whether the responsibilities of the civilian are inherently military activities. See *id.*; see also MCM, *supra* note 140, R.C.M. 202 analysis, at A21-11 ("To be 'accompanying an armed force' one's presence within a military installation must be more than merely incidental; it must be connected with or dependent upon the activities of the armed forces or its personnel."). Notably, one major security contracting firm, Blackwater USA, already argues that its overseas employees are part of the total military force for the purposes of defending against civil claims liability. See Brian Bennett, *Outsourcing the War*, TIME, Mar. 26, 2007, at 40. It would be ironic if it were to change its position to defend against the imposition of court-martial jurisdiction. See *id.*

<sup>148</sup> See 483 U.S. at 452–62 (Marshall, J., dissenting).

<sup>149</sup> See MEJA, 18 U.S.C. §§ 3261–3267 (2000 & Supp. IV 2004); Witte, *supra* note 142; Fidler & Sevastopulo, *supra* note 142; Singer, *Frequently Asked Questions*, *supra* note 142; Singer, *The Law Catches Up to Private Militaries*, *supra* note 142; *supra* notes 138–141 and accompanying text.

<sup>150</sup> Singer, *Frequently Asked Questions*, *supra* note 142.

<sup>151</sup> See Third Geneva Convention, *supra* note 37, arts. 3–4; *supra* notes 98–100 and accompanying text.

murder,<sup>152</sup> manslaughter,<sup>153</sup> attempts to commit murder or manslaughter,<sup>154</sup> conspiracy to murder,<sup>155</sup> assault,<sup>156</sup> and maiming.<sup>157</sup> Other crimes may be applicable depending upon the conduct involved in a violation of the law of war under customary international law.<sup>158</sup>

All the above listed crimes apply extraterritorially by operation of the language that extends applicability beyond the normal territorial borders of the United States to the SMTJ.<sup>159</sup> As also discussed above, the use of these statutes under the SMTJ Statute or the MEJA to apply extraterritorial jurisdiction to an American citizen does not violate due process based on the nationality principle.<sup>160</sup>

#### IV. RECENT PROSECUTIONS FOR TRADITIONAL VIOLATIONS OF THE LAW OF WAR: *UNITED STATES V. PASSARO* AND *UNITED STATES V. GREEN*

Two recent cases demonstrate that the legal framework for prosecuting violations of the law of war in U.S. federal courts is adequate and effective.<sup>161</sup> In 2004, the U.S. District Court for the Eastern District of North Carolina in *United States v. Passaro* presided over a case in which the SMTJ Statute was used to prosecute an assault that was also a violation of the law of war under customary international law.<sup>162</sup> The U.S. government is also presently using the MEJA in the case of *United States v. Green* in the Western District of Kentucky to prosecute an American citizen who allegedly raped a teenage Iraqi girl and murdered her and her family.<sup>163</sup> In both cases, however, the government declined to use the War Crimes Act to pursue justice for acts that are considered violations of the law of war under customary international law.<sup>164</sup>

<sup>152</sup> 18 U.S.C. § 1111 (2000 & Supp. III 2003).

<sup>153</sup> *Id.* § 1112 (2000).

<sup>154</sup> *Id.* § 1113.

<sup>155</sup> *Id.* § 1117.

<sup>156</sup> *Id.* § 113.

<sup>157</sup> 18 U.S.C. § 114.

<sup>158</sup> See *supra* notes 20–56 and accompanying text.

<sup>159</sup> See 18 U.S.C. §§ 7, 113–114, 1111–1113, 1117 (2000 & Supp. III 2003).

<sup>160</sup> See *supra* notes 86–90 and accompanying text.

<sup>161</sup> See *infra* notes 165–242 and accompanying text.

<sup>162</sup> See No. 5:04-CR-211-1 (E.D.N.C. June 17, 2004); *infra* notes 165–200 and accompanying text.

<sup>163</sup> See No. 3:06-MJ-00230 (W.D. Ky. Nov. 7, 2006); *infra* notes 201–242 and accompanying text.

<sup>164</sup> See *infra* notes 178–188, 196–200, 239–242 and accompanying text.



## A. United States v. Passaro: *The Use of the SMTJ Statute*

### 1. Statutory Basis for Prosecution

David Passaro was charged with assault using the SMTJ Statute after he beat Abdul Wali over the course of a two-day "interrogation" in the summer of 2003 at a military base in Afghanistan.<sup>165</sup> Although Passaro was employed as a contractor by the CIA and his activities were in support of the mission of the Department of Defense overseas, his misconduct took place prior to amendment of the MEJA in 2004.<sup>166</sup> Under these circumstances, the appropriate means of charging him was by use of the SMTJ Statute.<sup>167</sup> Specifically, the government charged Passaro by use of § 7(9)(A) of the SMTJ Statute on the grounds that the base in Afghanistan was a place in a foreign state used by the U.S. government; Passaro committed an offense as a national of the United States in violation of a federal criminal assault statute that applies within the SMTJ; and Passaro, at the time, did not fall within the class of persons covered by the MEJA.<sup>168</sup>

### 2. Procedural Posture and Result

Passaro was originally charged in June of 2004 with two counts of assault with a dangerous weapon and two counts of assault resulting in serious bodily injury.<sup>169</sup> He was tried by a federal jury in the Eastern District of North Carolina.<sup>170</sup> On August 17, 2006, he was found guilty of one count of assault resulting in serious bodily injury and guilty of lesser included offenses on the remaining charges.<sup>171</sup> A motion for judgment of acquittal filed by Passaro was denied on October 26, 2006.<sup>172</sup> Although the maximum penalty for his crime included eleven

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<sup>165</sup> See 18 U.S.C. § 7 (2000 & Supp. III 2003); Indictment, *Passaro*, *supra* note 2, at 1-4.

<sup>166</sup> MEJA, 18 U.S.C. §§ 3261-3267 (2000 & Supp. IV 2004); Indictment, *Passaro*, *supra* note 2, at 1; *supra* notes 129-131 and accompanying text.

<sup>167</sup> See 18 U.S.C. § 7; 18 U.S.C. §§ 3261-3267; Indictment, *Passaro*, *supra* note 2, at 1-3.

<sup>168</sup> See 18 U.S.C. § 7(9)(A); MEJA, 18 U.S.C. §§ 3261(a), 3267 (2000), amended by *id.* § 3267 (Supp. IV 2004); Indictment, *Passaro*, *supra* note 2, at 1-3.

<sup>169</sup> Indictment, *Passaro*, *supra* note 2, at 1-4.

<sup>170</sup> *Id.* at 1; Andrea Weigl, *Passaro Convicted of Assaulting Afghan*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 18, 2006, at 1A, available at <http://www.newsobserver.com/497/story/476483-p2.html>.

<sup>171</sup> See Jury Verdict at 1-4, *Passaro*, No. 5:04-CR-211-1; Weigl, *supra* note 170; White & Linzer, *supra* note 4.

<sup>172</sup> Order Denying Motion for Judgment of Acquittal at 1, *Passaro*, No. 5:04-CR-211-1.

and a half years' imprisonment, he was sentenced to serve only eight years and four months on February 13, 2007.<sup>173</sup>

### 3. Analysis of the Prosecution

The facts of this case involved allegations that Passaro did "willfully, knowingly and intentionally assault Abdul Wali with a dangerous weapon, namely, a flashlight, with intent to do bodily harm" and that Wali subsequently died.<sup>174</sup> Media reports questioned why he was not charged with something more serious than assault with a dangerous weapon or assault resulting in serious bodily injury.<sup>175</sup> The Department of Justice commented that, due to a lack of evidence, additional charges were not warranted.<sup>176</sup> It appears the main justification offered by the Department of Justice for not pursuing more serious charges was that Wali's family refused to allow the performance of an autopsy which would have yielded additional evidence to support more serious charges.<sup>177</sup>

Based on the facts specified in the indictment, Passaro could have been charged by use of the War Crimes Act as it existed prior to the passage of the Military Commissions Act of 2006.<sup>178</sup> At the time of his offense and through his trial, the War Crimes Act criminalized conduct "which constitutes a violation of [C]ommon Article 3 of the international conventions signed at Geneva."<sup>179</sup> The penalty for such a viola-

<sup>173</sup> *Nation in Brief*, *supra* note 4; Weigl, *supra* note 170; White & Linzer, *supra* note 4.

<sup>174</sup> Indictment, *Passaro*, *supra* note 2, at 1-3.

<sup>175</sup> *See id.* at 2-4; Susan Schmidt & Dana Priest, *Civilian Charged in Beating of Afghan Detainee*, WASH. POST, June 18, 2004, at A1; Scott Shane, *C.I.A. Contractor Guilty in Beating of Afghan Who Later Died*, N.Y. TIMES, Aug. 18, 2006, at A8; Weigl, *supra* note 170; White & Linzer, *supra* note 4.

<sup>176</sup> Schmidt & Priest, *supra* note 175.

<sup>177</sup> *See id.*; Shane, *supra* note 175; Weigl, *supra* note 170; White & Linzer, *supra* note 4.

<sup>178</sup> *See* War Crimes Act of 1996, 18 U.S.C. § 2441 (2000), *amended by* 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007); Military Commissions Act of 2006, Pub. L. No. 109-366, § 6, 120 Stat. 2600, 2632-35 (codified as amended at 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007)); Indictment, *Passaro*, *supra* note 2, at 1. Although the Bush administration initially refused to acknowledge that Common Article 3 applied to the conflict with Afghanistan, the Supreme Court has since held in *Hamdan v. Rumsfeld* that Common Article 3 applies to the treatment of detainees from that conflict. *See* 126 S. Ct. 2749, 2794-98 (2006) (majority opinion in part and plurality opinion in part).

<sup>179</sup> *See* War Crimes Act of 1996, 18 U.S.C. § 2441 (2000), *amended by* 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007); Third Geneva Convention, *supra* note 37, art. 3; Indictment, *Passaro*, *supra* note 2, at 1; Weigl, *supra* note 170.

tion is up to life in prison.<sup>180</sup> Where death results to the victim from the violation, the crime carries a possible death sentence.<sup>181</sup>

Prior to revision by the Military Commissions Act of 2006, the War Crimes Act criminalized certain conduct by incorporating Common Article 3's prohibitions against "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" upon detained persons during the course of an armed conflict not of an international character.<sup>182</sup> Additionally, the War Crimes Act incorporated Common Article 3's prohibitions regarding humiliating, inhumane, or degrading treatment of detained persons.<sup>183</sup>

The prosecution offered in its case that Wali, while in captivity, was subjected to multiple kicks to the groin and multiple strikes to his hands, legs, and abdomen with a Maglite flashlight.<sup>184</sup> Although it may be difficult to define and prove humiliating, inhumane, or degrading treatment, the facts alleged against Passaro clearly are those where a detained person was subject to violence to life and person in violation of Common Article 3 and the War Crimes Act.<sup>185</sup> Although Passaro argued that the death of Wali was the result of a heart attack and not the beating, a guilty finding under the War Crimes Act would still have provided the opportunity to impose up to a life sentence regardless of the cause of death.<sup>186</sup>

Even under the present version of the War Crimes Act, intentionally causing serious bodily injury is considered by statutory definition to be a grave breach of Common Article 3 when such an assault violates

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<sup>180</sup> 18 U.S.C.A. § 2441(a).

<sup>181</sup> *Id.*

<sup>182</sup> See 18 U.S.C. § 2441 (2000); Military Commissions Act of 2006 § 6; Third Geneva Convention, *supra* note 37, art. 3; *supra* notes 60–70, 101–104 and accompanying text.

<sup>183</sup> See 18 U.S.C. § 2441; Third Geneva Convention, *supra* note 37, art. 3; *supra* notes 60–70, 101–104 and accompanying text.

<sup>184</sup> Indictment, *Passaro*, *supra* note 2, at 1; Weigl, *supra* note 170.

<sup>185</sup> See 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007); Third Geneva Convention, *supra* note 37, art. 3; 152 CONG. REC. H7535 (daily ed. Sept. 27, 2006) (statement of Rep. Hunter); R. Jeffrey Smith, *Detainee Abuse Charges Feared*, WASH. POST, July 28, 2006, at A1; Draft Memorandum from John Yoo, Deputy Assistant Attorney Gen., & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def., Application of Treaties and Laws to Al Qaeda and Taliban Detainees 6 (Jan. 9, 2002) [hereinafter Yoo Memorandum], available at <http://antiwar.com/news/?articleid=2637>; Michael Isikoff, *Exclusive: Read War Crimes Memos*, MSNBC.COM, May 19, 2004, <http://www.msnbc.msn.com/id/4999734>; John Sifton, *Criminal, Immunize Thyself*, SLATE, Aug. 11, 2006, <http://www.slate.com/id/2147585>.

<sup>186</sup> See 18 U.S.C.A. § 2441; Scott Shane, *C.I.A. Interrogator's Defense to Cite Bush at Brutality Trial*, N.Y. TIMES, Feb. 11, 2005, at A11.

the law of war.<sup>187</sup> Because Passaro was found guilty of intentionally causing an assault resulting in serious bodily injury, he similarly could have been found guilty under the current War Crimes Act because a violation of the law of war takes place under Common Article 3 when one subjects a detained person to violence to life and person.<sup>188</sup>

Charges of murder, involuntary manslaughter, or torture were also possible in the case against Passaro.<sup>189</sup> For both practical and burden-of-proof reasons, the prosecution most likely decided that pursuit of assault charges alone was the best way to proceed.<sup>190</sup>

Having to prove intent to cause death likely prohibited a charge of murder because it is unlikely that Passaro intended to kill Wali as part of his interrogation.<sup>191</sup> Proof of torture required the prosecution to meet a very high standard, and show that Passaro acted under color of law and specifically intended to inflict severe physical pain or suffering upon Wali.<sup>192</sup> A prosecution for involuntary manslaughter, on its face, sounds better than a prosecution for assault resulting in serious bodily injury.<sup>193</sup> But, practically speaking, a conviction for involuntary manslaughter carries a lesser penalty—up to six years—than that for a conviction of assault resulting in serious bodily injury—up to ten years.<sup>194</sup>

Overall, it is understandable why the prosecution chose to pursue assault charges instead of murder, manslaughter, or torture charges.<sup>195</sup> Although there is no account as to why the War Crimes Act was not

<sup>187</sup> See 18 U.S.C. § 113(a)(6) (2000); 18 U.S.C.A. § 2441(d)(1)(F); Third Geneva Convention, *supra* note 37, art. 3; *supra* notes 20–56 and accompanying text. The War Crimes Act of 1996 defines the term “serious bodily injury” by incorporating the definition that is used in the federal assault statute. See 18 U.S.C. § 113(b)(2); *id.* § 1365(h)(3); 18 U.S.C.A. § 2441(d)(2)(B).

<sup>188</sup> See 18 U.S.C. § 113(a)(6); 18 U.S.C.A. § 2441(d)(1)(F); Third Geneva Convention, *supra* note 37, arts. 3, 13; Weigl, *supra* note 170; *supra* notes 20–56 and accompanying text.

<sup>189</sup> See 18 U.S.C. §§ 1111–1112 (2000); Anti-Torture Statute, 18 U.S.C. § 2340A (2000 & Supp. III 2003); Shane, *supra* note 175.

<sup>190</sup> See 18 U.S.C. § 113; Schmidt & Priest, *supra* note 175; Shane, *supra* note 175; Weigl, *supra* note 170; White & Linzer, *supra* note 4.

<sup>191</sup> See 18 U.S.C. § 1111; Schmidt & Priest, *supra* note 175. Passaro and another CIA contractor claimed to have performed cardiopulmonary resuscitation on Wali. Schmidt & Priest, *supra* note 175.

<sup>192</sup> See 18 U.S.C. §§ 2340–2340A (2000, Supp. III 2003 & Supp. IV 2004). The burden of proving severe pain and specific intent most likely resulted in the Department of Justice declining to prosecute Passaro for torture. See Memorandum from Daniel Levin, Acting Assistant Attorney Gen., to James B. Comey, Deputy Attorney Gen., Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A, at 5–11, 16–17 (Dec. 30, 2004), available at <http://www.usdoj.gov/olc/18usc23402340a2.htm>.

<sup>193</sup> See 18 U.S.C. §§ 113, 1112 (2000).

<sup>194</sup> See *id.* §§ 113(a)(6), 1112(b).

<sup>195</sup> See *supra* notes 189–194 and accompanying text.

used in this case, the most likely explanation is that the Department of Justice had a strong aversion to any use of the War Crimes Act to prosecute someone, especially a contractor for the CIA, for extraterritorial misconduct in the Global War on Terrorism.<sup>196</sup> To use the War Crimes Act to prosecute someone for misconduct in Afghanistan would amount to an implicit admission by the executive branch that the Geneva Conventions did in fact apply to that conflict.<sup>197</sup> Such an admission would be inconsistent with the policies and arguments put forth by the executive branch since the beginning of combat operations against the Taliban and Al Qaeda.<sup>198</sup>

Additionally, a denial that the War Crimes Act applied at all to the Global War on Terrorism helps to establish a precedent that precludes future prosecutions of government officials should a power shift take place in Washington.<sup>199</sup> Refusing to apply the War Crimes Act to the Global War on Terrorism also serves to reinforce the power of the President to decide how and when to regulate the conduct of foreign and military policy overseas.<sup>200</sup>

## B. United States v. Green: *The Use of the MEJA*

### 1. Factual and Statutory Basis for Prosecution

South of Baghdad, in the town of Mahmoudiyah, Iraq, Abeer Kassem Hamza Al-Janabi lived in a home about 200 meters from a mili-

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<sup>196</sup> See War Crimes Act of 1996, 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007); Elizabeth Holtzman, *Bush Seeks Immunity for Violating War Crimes Act of 1996*, CNN, SUN-TIMES, Sept. 23, 2006, at 14 [hereinafter Holtzman, *Bush Seeks Immunity*]; Elizabeth Holtzman, *Torture and Accountability*, NATION, July 18, 2005, at 21 [hereinafter Holtzman, *Torture and Accountability*]; Smith, *supra* note 185; Draft Memorandum from Alberto R. Gonzales, Counsel to the President, to George W. Bush, President of the U.S., Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban 2 (Jan. 25, 2002) [hereinafter Gonzales Memorandum], available at <http://www.msnbc.msn.com/id/4999148/site/newsweek>; Yoo Memorandum, *supra* note 185, at 2–5, 41–42; Isikoff, *supra* note 185; Sifton, *supra* note 185.

<sup>197</sup> See 18 U.S.C.A. § 2441; Gonzales Memorandum, *supra* note 196, at 2; Yoo Memorandum, *supra* note 185, at 14–34.

<sup>198</sup> See *Hamdan*, 126 S. Ct. at 2794–98 (majority opinion in part and plurality opinion in part); Smith, *supra* note 185; Gonzales Memorandum, *supra* note 196, at 1–4; Yoo Memorandum, *supra* note 185, at 14–34; Isikoff, *supra* note 185.

<sup>199</sup> See 18 U.S.C.A. § 2441; Holtzman, *Bush Seeks Immunity*, *supra* note 196; Holtzman, *Torture and Accountability*, *supra* note 196; Smith, *supra* note 185; Gonzales Memorandum, *supra* note 196, at 2; Yoo Memorandum, *supra* note 185, at 2–14; Isikoff, *supra* note 185; Sifton, *supra* note 185.

<sup>200</sup> See 18 U.S.C.A. § 2441; Yoo Memorandum, *supra* note 185, at 11, 38–42; Isikoff, *supra* note 185.

tary checkpoint manned by soldiers from the U.S. Army.<sup>201</sup> Along with her six-year-old sister Hadeel, Abeer and her parents, Kassem Hamza Rachid Al-Janabi and Fakhriya Taha Mohsine Al-Janabi, resided in one of the most dangerous areas of Iraq, known as the "Triangle of Death."<sup>202</sup> Just fourteen years old, Abeer, and her mother, became worried in early March of 2006 after some of the U.S. soldiers assigned to the area made advances towards her.<sup>203</sup>

Steven Green deployed to Iraq in September of 2005 as an infantry soldier with the 1st Battalion, 502nd Infantry Regiment, 101st Airborne Division.<sup>204</sup> In December of 2005, Green's unit was conducting security operations when an Iraqi civilian approached the checkpoint he was manning, pulled out a pistol, and shot two of his fellow soldiers at point-blank range.<sup>205</sup> After seeking mental help regarding the incident from an Army Combat Stress Team during that same month, Green was diagnosed with homicidal ideations, prescribed antipsychotic drugs, and sent back to his unit to resume his regular combat duties.<sup>206</sup>

Green and Abeer's paths crossed on March 12, 2006.<sup>207</sup> Green had previously been to Abeer's home as part of his duties in Mahmoudiyah.<sup>208</sup> After talking with his fellow soldiers about raping Abeer, Green and three others allegedly drank some alcohol, changed into dark clothes, grabbed their rifles and a shotgun, and went to Abeer's family home.<sup>209</sup> Once inside, Green allegedly took the family's AK-47 assault rifle, put Abeer's parents and her sister in a bedroom, and killed them.<sup>210</sup> Upon exiting the bedroom, Green and another soldier alleg-

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<sup>201</sup> Indictment at 3, *Green*, No. 3:06-MJ-00230 [hereinafter Indictment, *Green*]; Warrant for Arrest at 4, *Green*, No. 3:06-MJ-00230 [hereinafter Warrant for Arrest, *Green*]. All case information is available at <http://www.kywd.uscourts.gov/3-06-00230/DocketSheet.htm> (last visited Apr. 5, 2007).

<sup>202</sup> Indictment, *Green*, *supra* note 201, at 3; Ryan Lenz, "Homicidal" Soldier Was Returned to Duty, *HOUSTON CHRON.*, Jan. 10, 2007, at 1.

<sup>203</sup> See Warrant for Arrest, *Green*, *supra* note 201, at 5; Josh White, *Ex-Soldier Charged in Killing of Iraqi Family*, *WASH. POST*, July 4, 2006, at A1.

<sup>204</sup> Warrant for Arrest, *Green*, *supra* note 201, at 3; Lenz, *supra* note 202.

<sup>205</sup> Lenz, *supra* note 202; Andrew Tilghman, "I Came over Here Because I Wanted to Kill People," *WASH. POST*, July 30, 2006, at B1.

<sup>206</sup> Lenz, *supra* note 202.

<sup>207</sup> Indictment, *Green*, *supra* note 201, at 1-4; Warrant for Arrest, *Green*, *supra* note 201, at 4.

<sup>208</sup> Warrant for Arrest, *Green*, *supra* note 201, at 5; White, *supra* note 203.

<sup>209</sup> Indictment, *Green*, *supra* note 201, at 3; Warrant for Arrest, *Green*, *supra* note 201, at 5-6.

<sup>210</sup> Indictment, *Green*, *supra* note 201, at 3-4, 6-12; Warrant for Arrest, *Green*, *supra* note 201, at 5-6.

edly raped Abeer.<sup>211</sup> Green then allegedly shot Abeer in the head several times and had another soldier throw the AK-47 into a canal across the street from Abeer's home.<sup>212</sup> After the attack, Abeer's body was covered in blankets and set on fire.<sup>213</sup> Later that day, a local Iraqi observed the fire, discovered the bodies, and reported it to the American military.<sup>214</sup>

On March 20, 2006, Green was examined again by the Army Combat Stress Team and diagnosed with an antisocial personality disorder.<sup>215</sup> Due to his mental condition, Green was sent back to the United States around March 27, 2006, to be processed for discharge from the U.S. Army.<sup>216</sup> On May 16, 2006, Green was honorably and completely discharged from the U.S. Army.<sup>217</sup>

Until the mutilated bodies of two soldiers from Green's unit were found on June 19, 2006, after they had been kidnapped and killed by insurgents, Green and his fellow soldiers went about their lives.<sup>218</sup> During a combat stress debriefing arising out of the deaths of the kidnapped soldiers, the story about the rape and murder of Abeer and her family came out.<sup>219</sup> On June 27, 2006, the Army Criminal Investigative Division requested assistance and turned over its pursuit of charges against Green to the Federal Bureau of Investigation (the "FBI").<sup>220</sup> The FBI took charge of the investigation of Green and a warrant for his arrest was issued on June 30, 2006, by using the MEJA for charges of rape and murder.<sup>221</sup>

Green was charged by use of the MEJA because the offenses took place while he was a member of the Armed Forces subject to the UCMJ,

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<sup>211</sup> Indictment, *Green*, *supra* note 201, at 4, 13–14; Warrant for Arrest, *Green*, *supra* note 201, at 5–6.

<sup>212</sup> Indictment, *Green*, *supra* note 201, at 4, 6, 9, 19; Warrant for Arrest, *Green*, *supra* note 201, at 6.

<sup>213</sup> Indictment, *Green*, *supra* note 201, at 19; Warrant for Arrest, *Green*, *supra* note 201, at 6–7; White, *supra* note 203; Tim Whitmire, *Ex-Soldier Charged with Rape, Murder: Accused of Killing Family in Iraq*, CHI. SUN-TIMES, July 4, 2006, at 21.

<sup>214</sup> Warrant for Arrest, *Green*, *supra* note 201, at 6.

<sup>215</sup> Lenz, *supra* note 202.

<sup>216</sup> See *id.*

<sup>217</sup> Indictment, *Green*, *supra* note 201, at 1; Lenz, *supra* note 202; White, *supra* note 203; Whitmire, *supra* note 213.

<sup>218</sup> See Warrant for Arrest, *Green*, *supra* note 201, at 4, 7; Lenz, *supra* note 202; White, *supra* note 203; Whitmire, *supra* note 213.

<sup>219</sup> Warrant for Arrest, *Green*, *supra* note 201, at 4; Lenz, *supra* note 202; White, *supra* note 203; Whitmire, *supra* note 213.

<sup>220</sup> Warrant for Arrest, *Green*, *supra* note 201, at 4.

<sup>221</sup> 18 U.S.C. §§ 1111, 2241 (2000); MEJA, 18 U.S.C. §§ 3261–3267 (2000, Supp. III 2003 & Supp. IV 2004); Warrant for Arrest, *Green*, *supra* note 201, at 1, 3–4.

military court-martial jurisdiction under the UCMJ terminated upon his complete discharge from the military, and the offenses were punishable by imprisonment for more than one year had the offenses taken place in the SMTJ.<sup>222</sup> By use of the MEJA, Green was charged in the initial criminal complaint with three counts of premeditated murder, one count of premeditated murder in perpetration of aggravated sexual abuse, and one count of using force to cause another person to engage in a sexual act.<sup>223</sup> Although Green fell within the provisions of the MEJA because the alleged offenses were committed while he was a member of the Armed Forces, the method of prosecution and charges would equally apply had the accused been a private contractor or government agent employed in support of the mission of the Department of Defense overseas.<sup>224</sup>

## 2. Procedural Posture and Current Status

After a warrant was issued on June 30, 2006, Green was arrested in Marion, North Carolina, while returning home from the funeral of one of the mutilated soldiers.<sup>225</sup> After he made his initial appearance in court on July 6, 2006, a federal grand jury assembled to decide what charges should be made based on the facts of the case.<sup>226</sup> On November 7, 2006, the grand jury returned a seventeen-count indictment carrying a possible punishment of death if convicted on all counts.<sup>227</sup> As of April 4, 2007, his trial in the Western District of Kentucky has yet to be scheduled.<sup>228</sup>

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<sup>222</sup> See 18 U.S.C. §§ 1111, 2241; 18 U.S.C. § 3261; *Solorio v. United States*, 483 U.S. 435, 437, 451 (1987) (holding that court-martial jurisdiction is based on the accused having a military status); Criminal Complaint at 1–2, *Green*, No. 3:06-MJ-00230 [hereinafter Criminal Complaint, *Green*]; Warrant for Arrest, *Green*, *supra* note 201, at 3, 7.

<sup>223</sup> 18 U.S.C. §§ 3261–3267; Criminal Complaint, *Green*, *supra* note 222, at 1–2; Warrant for Arrest, *Green*, *supra* note 201, at 1, 3, 7.

<sup>224</sup> See 18 U.S.C. §§ 3261, 3267; Warrant for Arrest, *Green*, *supra* note 201, at 3, 7; *supra* notes 124–130 and accompanying text.

<sup>225</sup> Warrant for Arrest, *Green*, *supra* note 201, at 1; White, *supra* note 203; Whitmire, *supra* note 213.

<sup>226</sup> Indictment, *Green*, *supra* note 201, at 1; Order on Initial Appearance at 2, *Green*, No. 3:06-MJ-00230.

<sup>227</sup> Indictment, *Green*, *supra* note 201, at 1–19.

<sup>228</sup> United States District Court of Western Kentucky, *United States v. Green*, Steven D., [http://www.kywd.uscourts.gov/3-06-00230/Green\\_Case.php](http://www.kywd.uscourts.gov/3-06-00230/Green_Case.php) (last visited Apr. 4, 2007).



### 3. Analysis of the Prosecution in Comparison to That in *Passaro*

Much like the case of *Passaro*, the facts as alleged in *Green* demonstrate the exact sort of conduct that the War Crimes Act prohibits, in either its present or pre-Military Commissions Act form.<sup>229</sup> Under the definitions for grave breaches in the Geneva Conventions and the War Crimes Act, it is abundantly clear that the rape of a teenager and the murder of her and her family are war crimes under both the statute and customary international law.<sup>230</sup>

The interesting twist in *Green* is that charges have been pursued by using federal criminal statutes that carry the same possible penalty—death—as the War Crimes Act.<sup>231</sup> Unlike the *Passaro* case, the investigation in *Green* produced statements from co-conspirators and physical evidence that support serious charges, which include premeditated murder.<sup>232</sup> Because *Green* faces the death penalty or life in prison, the calls for justice and criticisms of lenient treatment heard in the *Passaro* case are not present in *Green*.<sup>233</sup>

*Green* demonstrates that, in serious instances of extraterritorial misconduct violating the law of war, a federal criminal prosecution by use of Title 18 criminal statutes provides the federal government with the ability to prosecute war crimes that occur overseas.<sup>234</sup> The *Green* and *Passaro* cases together also show the prosecutorial difficulties encountered in pursuing such crimes.<sup>235</sup>

On the one hand, the prosecution in *Passaro* lacked the evidence necessary to support more serious charges beyond assault, was made difficult by government classification of information, and involved the

<sup>229</sup> See War Crimes Act of 1996, 18 U.S.C. § 2441 (2000), amended by 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007); Military Commissions Act of 2006, Pub. L. No. 109-366, § 6, 120 Stat. 2600, 2632-35 (codified as amended at 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007)); Indictment, *Green*, *supra* note 201, at 1-4; Warrant for Arrest, *Green*, *supra* note 201, at 3-6; *supra* notes 2-6, 165-200 and accompanying text.

<sup>230</sup> See War Crimes Act of 1996, 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. IV 2007); Third Geneva Convention, *supra* note 37, arts. 3, 130; Indictment, *Green*, *supra* note 201, at 1-4; Warrant for Arrest, *Green*, *supra* note 201, at 3-6; *supra* notes 20-56 and accompanying text.

<sup>231</sup> See 18 U.S.C. § 1111 (2000 & Supp. III 2003); 18 U.S.C.A. § 2441(a); Indictment, *Green*, *supra* note 201, at 2, 6-12.

<sup>232</sup> See 18 U.S.C. § 1111; Indictment, *Green*, *supra* note 201, at 6-9; Warrant for Arrest, *Green*, *supra* note 201, at 1, 3-7; *supra* notes 2-6, 165-200 and accompanying text.

<sup>233</sup> See 18 U.S.C. § 1111; 18 U.S.C.A. § 2441(a); Indictment, *Green*, *supra* note 201, at 2, 6-12; *supra* notes 174-177 and accompanying text.

<sup>234</sup> See 18 U.S.C. § 1111; MEJA, 18 U.S.C. §§ 3261-3267 (2000 & Supp. IV 2004); Indictment, *Green*, *supra* note 201, at 1-4.

<sup>235</sup> See *infra* notes 236-237 and accompanying text.

issue of an assault committed during an interrogation.<sup>236</sup> The *Green* prosecution, on the other hand, appears to benefit from the cooperation of co-conspirators, the help of the Army Criminal Investigative Division, the help of Iraqi authorities in gathering evidence in Iraq, and the support of the military in bringing Abeer's rapist and murderer to justice.<sup>237</sup> The cases show that any prosecution for an extraterritorial war crime must deal with the issues of the remoteness of the crime scene; issues arising out of combat operations in finding witnesses, victims, and evidence; and cultural prohibitions on autopsies.<sup>238</sup>

Even though *Green* is a case where charges of rape and murder are amply supported by the evidence, the question remains: Why not use the War Crimes Act in a prosecution where it is so clear that a war crime took place?<sup>239</sup> Again, pressures from within the executive branch and Department of Justice are likely to blame.<sup>240</sup> Refusing to use the War Crimes Act to punish war crimes from the conflict in Iraq avoids setting a precedent that a criminal statute constrains action by the President and the military in prosecuting the war.<sup>241</sup> It also serves to avoid setting a precedent that the law may be used against U.S. government agents for their conduct should it violate the Geneva Conventions.<sup>242</sup>

## V. GETTING AWAY WITH WAR CRIMES: THE GAP IN THE MEJA

An assault by striking, beating, or wounding is a violation of the law of war when the victim is a prisoner, detainee, or member of the civilian populace.<sup>243</sup> Unfortunately, the MEJA is not applicable to these types of assaults because the maximum penalties are not sufficient to trigger the

<sup>236</sup> See Indictment, *Passaro*, *supra* note 2, at 1-4; Schmidt & Priest, *supra* note 175; Shane, *supra* note 175; Weigl, *supra* note 170; White & Linzer, *supra* note 4.

<sup>237</sup> See Indictment, *Green*, *supra* note 201, at 1-4, 19-22; Warrant for Arrest, *Green*, *supra* note 201, at 3-7; Lenz, *supra* note 202; White, *supra* note 203; Whitmire, *supra* note 213.

<sup>238</sup> See *supra* notes 236-237 and accompanying text.

<sup>239</sup> See 18 U.S.C.A. §§ 1111, 2241 (West 2001, Supp. 2006 & Supp. II 2006); War Crimes Act of 1996, 18 U.S.C.A. § 2441 (West 2000, Supp. 2006 & Supp. 2007); *supra* notes 201-224 and accompanying text.

<sup>240</sup> See *supra* notes 196-200 and accompanying text.

<sup>241</sup> See 18 U.S.C.A. § 2441; Yoo Memorandum, *supra* note 185, at 11, 34-42; Isikoff, *supra* note 185.

<sup>242</sup> See 18 U.S.C.A. § 2441; Third Geneva Convention, *supra* note 37, arts. 3, 129; Holtzman, *Bush Seeks Immunity*, *supra* note 196; Holtzman, *Torture and Accountability*, *supra* note 196; Gonzales Memorandum, *supra* note 196, at 2; Yoo Memorandum, *supra* note 185, at 11, 41-42; Isikoff, *supra* note 185; Sifton, *supra* note 185.

<sup>243</sup> See *infra* notes 246-252 and accompanying text.

application of the statute.<sup>244</sup> This gap in the MEJA leaves the government without a means to prosecute war crimes in certain situations.<sup>245</sup>

### A. Assaults by Striking, Beating, or Wounding as War Crimes

An assault by striking, beating, or wounding is a war crime when committed in a fashion that violates the law of war as understood by customary international law.<sup>246</sup> As discussed in the preceding text, the law of war includes the Geneva Conventions.<sup>247</sup> In international and noninternational armed conflicts, a physical assault committed by a party to a conflict violates the Geneva Conventions when it subjects prisoners, detainees, or members of the civilian populace to violence to their life or person.<sup>248</sup>

For example, an assault by striking, beating, or wounding would be a war crime where: (1) an American citizen, employed as an interrogator by the Department of Defense overseas, punches a detainee in the face without justification during an interrogation at a military compound; or (2) an American citizen, employed by a Department of Defense contractor overseas as a truck driver, slaps an Iraqi civilian in a dispute over the sale of an item from a souvenir stand located within an American military compound.<sup>249</sup> These two examples are by no means all-inclusive, but they highlight the fact that in certain circumstances, an assault by striking, beating, or wounding can fall within the realm of war crimes by violating the Geneva Conventions.<sup>250</sup>

In the first example, the punching of a detainee without justification by one employed by the Department of Defense violates the Geneva Conventions and the law of war because it subjects a protected person—a detainee—to violence to his life or person.<sup>251</sup> In the second example, the slapping of an Iraqi civilian by one working in support of the Department of Defense violates the Geneva Conventions and

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<sup>244</sup> See *infra* notes 253–260 and accompanying text.

<sup>245</sup> See *infra* notes 246–260 and accompanying text.

<sup>246</sup> See 18 U.S.C. § 113(a) (4) (2000); Third Geneva Convention, *supra* note 37, arts. 3, 13; *supra* notes 20–56 and accompanying text.

<sup>247</sup> See *supra* notes 36–38, 41–47 and accompanying text.

<sup>248</sup> See Third Geneva Convention, *supra* note 37, arts. 3–4, 13.

<sup>249</sup> See 18 U.S.C. § 113(a) (4); Third Geneva Convention, *supra* note 37, arts. 3–4, 13; *supra* notes 20–56 and accompanying text.

<sup>250</sup> See 18 U.S.C. § 113(a) (4); Third Geneva Convention, *supra* note 37, arts. 3–4, 13; *supra* notes 20–56 and accompanying text.

<sup>251</sup> See Third Geneva Convention, *supra* note 37, arts. 3–4, 13; *supra* notes 20–56 and accompanying text.

the law of war because it subjects a protected person—a civilian not taking part in hostilities—to violence to his life or person.<sup>252</sup>

### B. *The MEJA Gap for Assaults by Striking, Beating, or Wounding*

In the above fictional situations, both civilian and military authorities may consider it appropriate in certain circumstances to punish the offenders by administrative action through their employer, such as a reprimand or firing.<sup>253</sup> But, when media pressures or a need for justice dictate that these types of war crimes be prosecuted in a U.S. federal court, the government is left without recourse under the current state of the law.<sup>254</sup>

Because the maximum six-month penalty for an assault by striking, beating, or wounding does not exceed the one-year requirement that triggers the use of the MEJA to prosecute, the fictional employees of the Department of Defense could not be prosecuted by using the MEJA.<sup>255</sup> Additionally, the status of the offender, as one subject to the MEJA, prohibits prosecution by use of § 7(9) of the SMTJ Statute.<sup>256</sup> Fortunately, the situations where the MEJA has a gap are limited because other serious crimes and assaults, involving dangerous weapons or serious bodily injury, carry sufficient penalties that trigger the MEJA to allow for prosecution in a civilian court in the United States.<sup>257</sup>

Some commentators point to the lack of any prosecutions of contractors by using the MEJA in the Global War on Terrorism to suggest that the Department of Justice lacks the desire and resources necessary to pursue such cases.<sup>258</sup> One critic points to the difficulties prosecutors face in assembling a case against an offender from 9000 miles away while contending with dispersed witnesses and the competing demands of local cases to account for the lack of use of the MEJA to prosecute a single civilian for misconduct in the Global War on Ter-

<sup>252</sup> See Third Geneva Convention, *supra* note 37, arts. 3–4, 13; *supra* notes 20–56 and accompanying text.

<sup>253</sup> See Singer, *The Law Catches Up to Private Militaries*, *supra* note 142.

<sup>254</sup> See *supra* notes 91–160 and accompanying text.

<sup>255</sup> See 18 U.S.C. § 113(a)(4) (2000); MEJA, 18 U.S.C. §§ 3261–3267 (2000 & Supp. IV 2004); *supra* notes 124–133 and accompanying text.

<sup>256</sup> See 18 U.S.C. § 7(9) (Supp. III 2003); 18 U.S.C. §§ 3261–3267; *supra* notes 129–133 and accompanying text.

<sup>257</sup> See 18 U.S.C. §§ 113–114; 18 U.S.C. § 1111–1112 (2000 & Supp. III 2003); 18 U.S.C.A. §§ 2241–2242, 2244 (West 2000, Supp. 2006 & Supp. II 2006); 18 U.S.C. §§ 3261–3267.

<sup>258</sup> See Fidler & Sevastopulo, *supra* note 142; Singer, *Frequently Asked Questions*, *supra* note 142; Singer, *The Law Catches Up to Private Militaries*, *supra* note 142.

rorism.<sup>259</sup> Although there are procedural difficulties in using the MEJA, those reasons are no excuse for allowing a gap to continue to exist that could prohibit the future prosecution of American citizens whose actions violate the law of war.<sup>260</sup>

## VI. RECOMMENDATIONS FOR CONGRESSIONAL ACTION

The MEJA gap can and should be corrected by congressional action.<sup>261</sup> By eliminating the requirement that an offense be punishable by more than one year of imprisonment or by changing the penalties for certain offenses, Congress can extend the reach of the law to cover certain assaults by American citizens that violate the law of war.<sup>262</sup> Additionally, by repealing the authority for civilian courts-martial to preserve the rights of citizens to a trial in a civilian court, Congress can ensure that the burden of prosecuting instances of overseas civilian misconduct is handled by the Department of Justice and not a military justice system designed for those with a military status.<sup>263</sup>

### A. Options for Fixing the MEJA

Since its inception in 2000, the MEJA has been subject to a variety of criticisms.<sup>264</sup> It was modified in the aftermath of Abu Ghraib to ensure that it covered personnel working *in support of* the Department of Defense overseas, not just those working *for* the Department of Defense.<sup>265</sup> Legislation is pending that would create a federal investigative unit focused on overseas misconduct and redefine the class of personnel covered by the MEJA to cover more broadly those Americans involved in supporting any contingency operation.<sup>266</sup> What continues to

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<sup>259</sup> See Singer, *Frequently Asked Questions*, *supra* note 142; Singer, *The Law Catches Up to Private Militaries*, *supra* note 142.

<sup>260</sup> See 18 U.S.C. § 113(a)(4); 18 U.S.C. §§ 3261–3267; *supra* notes 246–257 and accompanying text.

<sup>261</sup> See *infra* notes 264–272 and accompanying text.

<sup>262</sup> See *infra* notes 264–272 and accompanying text.

<sup>263</sup> See *infra* notes 273–279 and accompanying text.

<sup>264</sup> See Schmitt, *supra* note 130, at 41–45 (highlighting the MEJA's lack of authority over certain contractors prior to 2004); Stein, *supra* note 7, at 598–607 (describing past and present problems with the MEJA); Press Release, Representative David Price, Price Introduces Private Security Contractor Legislation (Jan. 10, 2007), available at <http://price.house.gov/News/DocumentSingle.aspx?DocumentID=55209>.

<sup>265</sup> See MEJA, 18 U.S.C. §§ 3261–3267 (2000 & Supp. IV 2004); *supra* notes 129–130 and accompanying text.

<sup>266</sup> See 18 U.S.C. §§ 3261, 3267; Transparency and Accountability in Military and Security Contracting Act of 2007, S. 674, 110th Cong. (1st Sess. 2007); Transparency and Accountability in Security Contracting Act of 2007, H.R. 369, 110th Cong. (1st Sess. 2007).

be overlooked is the gap that exists for crimes that are punishable by a sentence of one year or less if committed within the SMTJ of the United States.<sup>267</sup>

Congress has the power to modify the law to fill this gap in one of two ways: (1) by changing the language of the MEJA to eliminate the requirement that the offense carry a possible punishment of more than one year of imprisonment, or (2) by increasing the penalties for certain offenses that Congress desires the MEJA to cover.<sup>268</sup> Of these two options, changing the language of the MEJA would encompass the widest range of offenses and provide for the greatest reach of prosecution for overseas misconduct by American citizens supporting the mission of the Department of Defense.<sup>269</sup>

But, attempts to expand the scope of offenses covered by the MEJA would likely run into opposition from lobbyists and trade groups that represent contractors, such as the Professional Services Council.<sup>270</sup> If modifying the language of the MEJA is not possible for reasons of political compromise or expediency, then the maximum penalty for assault by striking, beating, or wounding should be increased to exceed one year of imprisonment so as to bring these offenses within those covered by the MEJA.<sup>271</sup> If turning these types of assaults into felonies is unpalatable, Congress has the power to modify the assault statute to add a penalty that exceeds one year of imprisonment for assaults conducted upon a person in the custody of the United States or entitled to the protections of the Geneva Conventions.<sup>272</sup>

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<sup>267</sup> See 18 U.S.C. § 7 (2000 & Supp. III 2003); *supra* notes 124–133, 253–260 and accompanying text.

<sup>268</sup> See 18 U.S.C. § 3261.

<sup>269</sup> See *id.* §§ 3261–3267.

<sup>270</sup> See *id.*; Witte, *supra* note 142; Fidler & Sevastopulo, *supra* note 142.

<sup>271</sup> See 18 U.S.C. § 113(a)(4) (2000); MEJA, 18 U.S.C. §§ 3261–3267 (2000 & Supp. IV 2004).

<sup>272</sup> See 18 U.S.C. § 113(a)(4); Third Geneva Convention, *supra* note 37, arts. 3–4. For example, Congress could modify the assault statute to read:

18 U.S.C. 113(a)(4) Assault by striking, beating, or wounding, by a fine under this title or imprisonment for not more than six months, or both, or if the victim of the assault is in the custody of the United States or an individual entitled to the protections of the Geneva Conventions, by a fine under this title or imprisonment for not more than two years, or both.

See 18 U.S.C. § 113(a)(4); Third Geneva Convention, *supra* note 37, arts. 3–4.

### B. *Repeal the Authority for Civilian Courts-Martial in the UCMJ*

Notwithstanding the constitutional questions raised by the recent change to the jurisdiction of the UCMJ, the existence of an alternative method of holding American citizens accountable for their misconduct while overseas in support of the Department of Defense does little to encourage or require the Department of Justice to pursue charges and apply the MEJA as passed by Congress.<sup>273</sup> If anything, the attempted and questionable extension of courts-martial jurisdiction over civilians could facilitate the partial withdrawal of the Department of Justice from the business of regulating the conduct of those Americans working in support of the Department of Defense overseas.<sup>274</sup>

Over the course of the last decade, Congress and the military, through legislation and regulations, have worked out a system that allows for the bringing of civilians to justice for certain extraterritorial misconduct.<sup>275</sup> A duty to police contractors should not be imposed on military commanders where the majority of contractors are not embedded in their unit and often work alongside in solely a coordinating role.<sup>276</sup>

If anything, the rights of an American citizen to a trial in a civilian court should be reason enough to limit the jurisdiction of a court-martial to those that have a military status.<sup>277</sup> For now, the revision

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<sup>273</sup> See UCMJ, 10 U.S.C.A. § 802 (West 1998 & Supp. IV 2007); 18 U.S.C. §§ 3261–3267; Witte, *supra* note 142; Singer, *Frequently Asked Questions*, *supra* note 142; *supra* notes 138–150 and accompanying text.

<sup>274</sup> See 10 U.S.C.A. § 802; Witte, *supra* note 142; Fidler & Sevastopulo, *supra* note 142; Singer, *The Law Catches Up to Private Militaries*, *supra* note 142; *supra* notes 142–150 and accompanying text.

<sup>275</sup> See 18 U.S.C. §§ 3261–3267; Transparency and Accountability in Military and Security Contracting Act of 2007, S. 674, 110th Cong. (1st Sess. 2007) (proposing establishment of an FBI Theater Investigative Unit to investigate violations of law by contractors that are prosecutable using the MEJA); Transparency and Accountability in Security Contracting Act of 2007, H.R. 369, 110th Cong. (1st Sess. 2007) (House version of the Senate bill); U.S. DEP'T OF DEF., INSTRUCTION NO. 5521.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OF THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS (2005); *supra* notes 124–137 and accompanying text.

<sup>276</sup> See Merle & McCarthy, *supra* note 129; Press Release, Representative David Price, *supra* note 264; Singer, *Frequently Asked Questions*, *supra* note 142; Singer, *The Law Catches Up to Private Militaries*, *supra* note 142.

<sup>277</sup> See *Solorio v. United States*, 483 U.S. 434, 436, 439, 450–51 (1987) (holding that court-martial jurisdiction is based on the accused having a military status); *McElroy v. Guagliardo*, 361 U.S. 281, 283–84 (1960) (holding that civilian employees accompanying the military overseas in peacetime may not be subject to civilian courts-martial for non-capital offenses); *Grisham v. Hagan*, 361 U.S. 278, 280 (1960) (holding that civilian employees accompanying the military overseas may not be subject to civilian courts-martial

made to the UCMJ is the law of the land.<sup>278</sup> When a test case involving a twenty-first-century civilian court-martial makes its way to the Supreme Court, the Court could very well announce the same language it used largely to extinguish civilian courts-martial in the twentieth century:

When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government.<sup>279</sup>

### CONCLUSION

Federal laws, when considered in their totality, provide the government with the ability to prosecute American citizens for extraterritorial violations of the law of war. The War Crimes Act, Genocide Convention Implementation Act, and Anti-Torture Statute offer prosecutors a means for addressing specific conduct that is universally condemned. The MEJA and the SMTJ Statute offer prosecutors a means for addressing in U.S. federal courts the majority of extraterritorial conduct by American citizens that violates the law of war. Additionally, the recent well-intentioned expansion of the jurisdiction of the UCMJ could provide an alternative means of prosecution by use of a court-martial for extraterritorial misconduct by American citizens accompanying the military in a declared war or contingency operation. Taken together, an adequate legal framework exists to bring American citizens who violate the laws of war to justice.

The MEJA and SMTJ Statute have proven their utility and viability in the recent cases of *United States v. Passaro* and *United States v. Green*. These two cases show that the dearth of prosecutions of civilians for extraterritorial misconduct in the Global War on Terrorism is not the result of a lack of a legal framework, but stems from other factors ranging from the practical difficulties of assembling a case to political considerations in-

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for capital offenses); *Reid v. Covert*, 354 U.S. 1, 5 (1957) (plurality opinion) (holding that civilian dependents accompanying the military overseas may not be subject to civilian courts-martial for capital offenses); *United States v. Averette*, 41 C.M.R. 363, 365 (1970) (holding that a civilian accompanying the Armed Forces may only be subject to a court-martial where Congress has made an express declaration of war); Witte, *supra* note 142; *supra* notes 138–150 and accompanying text.

<sup>278</sup> See 10 U.S.C.A. § 802; Singer, *Frequently Asked Questions*, *supra* note 142.

<sup>279</sup> See *Reid*, 354 U.S. at 6.



volving how best to fight the Global War on Terrorism. Still, however, there are weaknesses in these laws that can and should be addressed.

Although the MEJA has evolved in the six and a half years since its enactment to cover American citizens working overseas in support of the Department of Defense, it continues to leave a gap in coverage over certain assaults that could be considered to violate the law of war. Certain assaults carrying maximum sentences of less than one year of imprisonment can constitute violations of the law of war depending upon the circumstances of their commission, but are not included under the MEJA. Putting aside the practical difficulties of using the MEJA, the government should not be left without a means to pursue justice in the courts in a case involving an assault by striking, beating, or wounding a person entitled to the protections of the Geneva Conventions.

Congress should act now to fix the deficiencies that exist in the body of federal law that allows for the prosecution of American citizens who violate the law of war. Congress needs to fix the gap in the MEJA that exists for crimes not carrying a punishment sufficient to trigger application of the statute. This can be done in one of two ways. Preferably, Congress should amend the MEJA to do away with the requirement that the offense carry a penalty of more than one year of imprisonment if it were committed within the SMTJ. Alternatively, Congress could increase the penalties for certain offenses to bring them within the provisions of the MEJA.

Additionally, Congress should not allow the expansion of the jurisdiction of the UCMJ to remain on the books. Subjecting civilians to trial by court-martial represents a serious infringement upon a citizen's constitutional right to a grand jury proceeding and trial by one's peers. The existence of an alternative means to prosecute by using a court-martial will also detract from the continued refinement of the procedures for using the MEJA as the primary means of prosecuting Americans working in support of the Department of Defense for extraterritorial misconduct. The burden of prosecuting American citizens, who more often than not work alongside the military and not within a chain of command, should fall upon the Department of Justice, not the military justice system.

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